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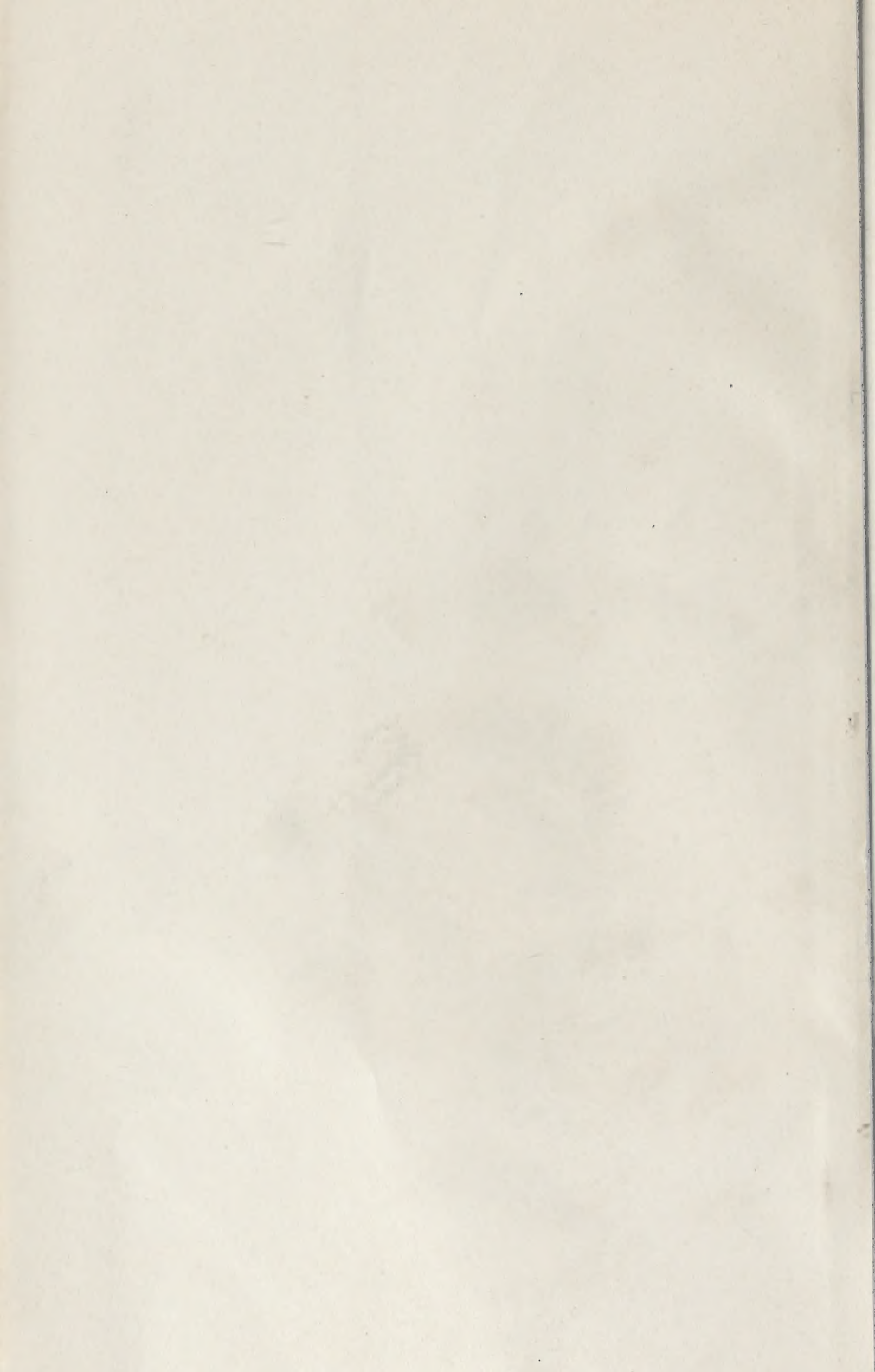
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United States
Circuit Court of Appeals
For the Ninth Circuit.

CRANE COMPANY, a Corporation,
Appellant,

vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

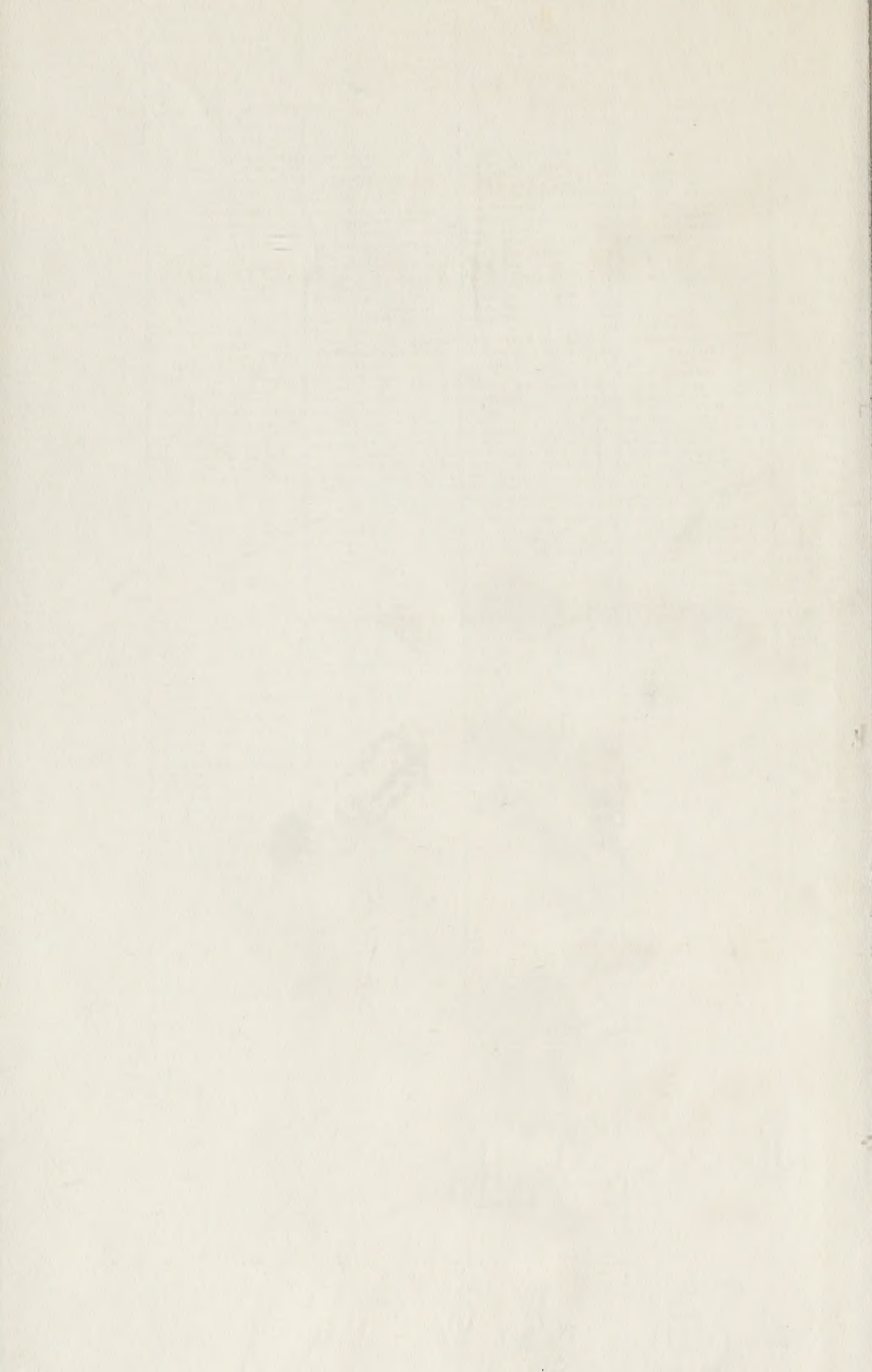
Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

APR 13 1916

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

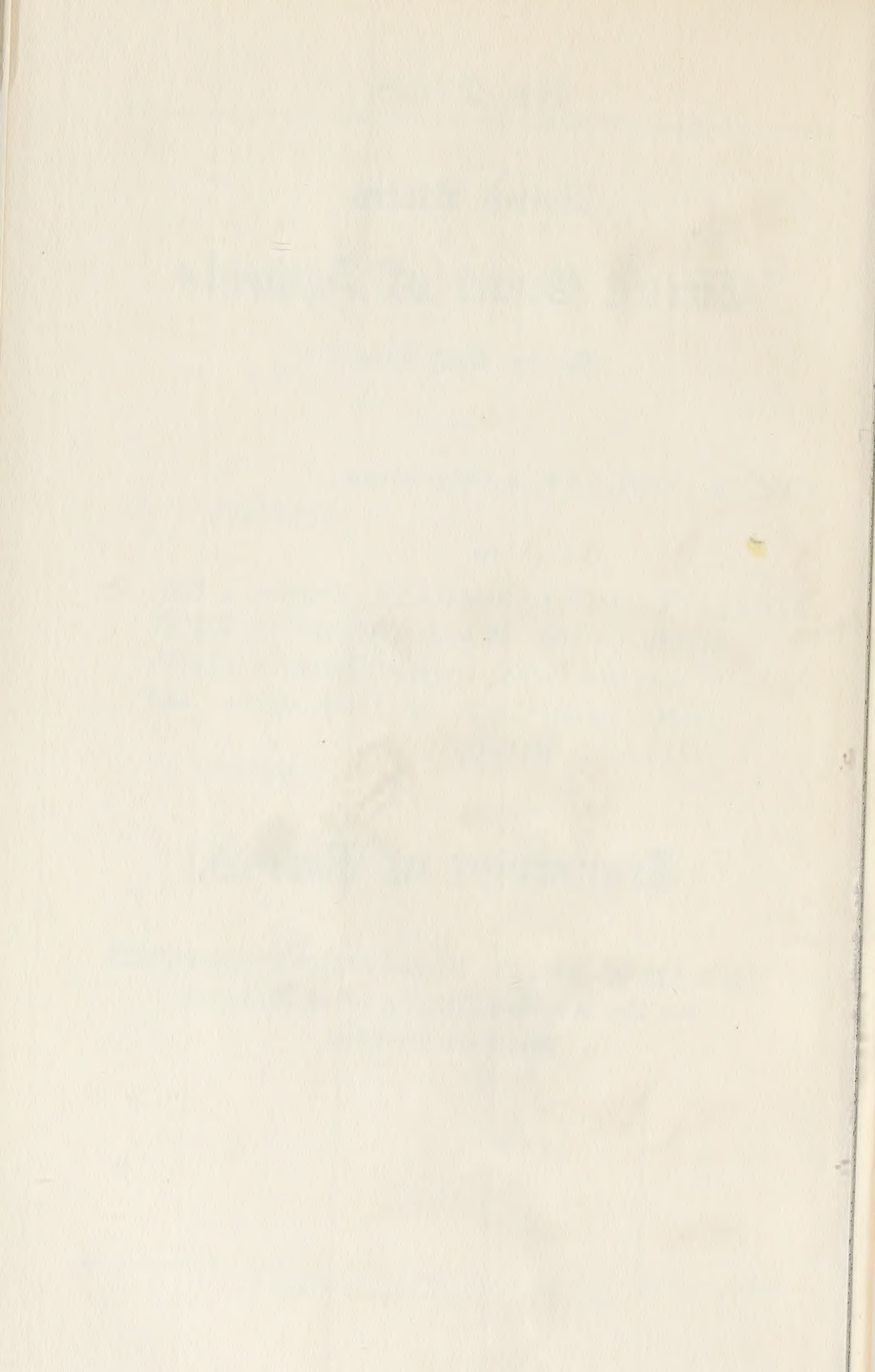
CRANE COMPANY, a Corporation,
Appellant,

vs.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Solicitors.

MAURICE W. SEITZ, Esquire, #1033 Northwestern Building, Portland, Oregon,
Solicitor for the Appellant.

RANDOLPH W. CHILDS, Esquire, #617 Tacoma Bldg., Tacoma, Washington;

MAURICE A. LANGHORNE, Esquire, #617 Tacoma Bldg., Tacoma, Washington; and

FREDERIC D. METZGER, Esquire, #617 Tacoma Bldg., Tacoma, Washington,
Solicitors for Appellees. [1*]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

No. 15—E.

FIDELITY TRUST COMPANY, Trustee, a Corporation,

Claimant,

vs.

WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,

Respondents,

and

CRANE CO., a Corporation,

Intervenor.

*Page-number appearing at foot of page of original certified Record.

Stipulation (as to Record on Appeal).

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys of record, that the clerk of the above-entitled court may prepare a certificate to constitute the record on appeal in the above case, the following papers and documents, omitting all captions, endorsements, verifications, acceptances of service, etc., the record to be printed in San Francisco, California:

1. Amended and supplemental bill of complaint, omitting exhibits.
2. Answer of Washington-Oregon Corporation.
3. Order permitting Crane Co. to file its intervening petition herein.
4. Order permitting Crane Co. to file its amended petition of intervention, herein.
5. Amended petition of intervention of Crane Co.
6. Answer of complainant and respondent to original petition of intervention.
7. Stipulation to the effect that the answer to the original petition of intervention should stand as the answer to the amended petition of intervention. [2]
8. Original stipulation filed November 8th, 1915.
9. Supplemental stipulation of facts filed herein on the 8th day of November, 1915.
10. Judge's decision.
11. Judgment and decree.
12. Petition for appeal.
13. Order allowing appeal.

14. Bond on appeal.
15. Assignments of error.
16. Stipulation as to original exhibits, etc.

IT IS, HOWEVER, AGREED, that neither party is precluded by this stipulation from causing the certification as part of the record on appeal of any additional matter now on the record.

Dated this 13th day of March, 1916.

RANDOLPH L. CHILDS,
HAYDEN, LANGHORNE & METZGER,
Attorneys for Complainant.
MAURICE W. SEITZ,
Attorneys for Crane Co.

(Filed Mar. 14, 1916.) [3]

Amended and Supplemental Bill of Complaint.

To the Honorable, the Judges of the District Court
of the United States for the Western District of
Washington, Sitting in Equity:

Fidelity Trust Company, Trustee under the mortgage hereinafter referred to, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, brings this, its Amended and Supplemental Bill of Complaint, against Washington-Oregon Corporation, a corporation organized and existing under and by virtue of the laws of the State of Washington, C. E. Cook, a resident and citizen of the State of Washington, Joseph Smith, a resident and citizen of the State of Washington, John Kesser, a resident and citizen of the State of Washington, Robert Jeffrey, a resident and citizen of the State of

Washington, and Willis D. Hoag, a resident and citizen of the [4] State of Oregon, and thereupon your orator complains and says:

First. That on and prior to the first day of April, 1911, the defendant, Washington-Oregon Corporation, was and still is a corporation duly organized and existing under the laws of the State of Washington, and a resident and citizen of the State of Washington, and that Washington-Oregon Corporation then was and still is duly authorized under the laws of the States of Oregon and Washington to construct, own, maintain and operate the property and premises hereinafter mentioned, and to make, execute and deliver the mortgage hereinafter sought to be foreclosed, and to make, deliver and issue the bonds therein referred to.

Second. That your orator, Fidelity Trust Company, at all times hereinafter mentioned was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and that it is a resident and citizen of the State of Pennsylvania, and an inhabitant of the Eastern District thereof within the meaning of the laws determining the jurisdiction of this Honorable Court, and that at all times hereinafter mentioned, it was, and now is duly authorized and empowered under the terms of its charter, to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trust upon it imposed under and by virtue of the mortgage or deed of trust hereinafter described.

Third. That C. E. Cook at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Fourth. That Joseph Smith at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Fifth. That John Kesser at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Sixth. That Robert Jeffrey at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington. [5]

Seventh. That Willis D. Hoag at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Oregon.

Eighth. That heretofore and prior to the nineteenth of May, 1911, the defendant, Washington-Oregon Corporation, in the exercise of its powers under the laws of the States of Washington and Oregon, and in accordance with resolutions duly passed by its board of trustees and by its stockholders at respective meetings thereof duly called and held, which said resolutions of its stockholders were duly concurred in by the vote in person or by proxy of holders of more than two-thirds of the par value of the issued capital stock of Washington-Oregon Corporation, duly authorized the execution and delivery by the proper officers of Washington-Oregon Corporation of negotiable bonds in the amount of \$5,000,000 par value, dated the first day of April, 1911, and payable at the office of your

orator, as trustee, in the city of Philadelphia, State of Pennsylvania, on the first day of April, 1936, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, or at the option of the company on any semi-annual interest day before maturity by payment of the principal sum due thereon, with five per centum thereof additional and accrued interest; said bonds to bear interest at the rate of six per centum per annum; payable in like gold coin or its equivalent semi-annually on the first days of April and October of each year at the office of your orator, and without deducting from either principal or interest of any tax which might by any future or then existing laws of the United States, or of the State of Washington, be imposed thereon; said bonds to be for such denomination or par value, and in such form consistent with the terms of the mortgage or deed of trust hereinafter referred to, as at the time of the issue thereof the board of trustees of the Washington-Oregon Corporation should prescribe; the \$1,500,000 of said bonds which, as therein provided, should be issued forthwith, to be coupon bonds of the denomination of \$1,000, numbered consecutively from one [6] upwards, and coupon bonds of the denomination of \$500, numbered from A-1 upwards; said bonds aggregating \$1,500,000 to be certified by your orator, as trustee, and by it delivered to or upon the order in writing of the president, vice-president or treasurer of Washington-Oregon Corporation, or such other persons as the board of trustees might direct, upon the execution, delivery and recording of the mort-

gage or deed of trust hereinafter referred to; the balance of said bonds aggregating \$3,500,000 par value, to be retained by Washington-Oregon Corporation, and when, from time to time, and in such amounts as should be required for the purpose of redeeming the outstanding bonded indebtedness on the property of Washington-Oregon Corporation and in order to provide for construction, equipment, betterments, improvements, additions to the plant and property of the Washington-Oregon Corporation then owned or thereafter to be acquired, when made and to be made, and for the acquisition of any property, real or personal, or franchises, which Washington-Oregon Corporation was legally authorized and empowered to own, lease and operate for any of said purposes, and for other corporate purposes, the said \$3,500,000 par value of bonds were to be delivered to your orator and by your orator certified and delivered to Washington-Oregon Corporation, upon resolution of the Board of Trustees of said Washington-Oregon Corporation, subject to the limitations in said mortgage contained.

Ninth. That on or about the nineteenth day of May, 1911, being thereunto duly authorized by the laws of the States of Washington and Oregon, and by resolutions duly passed by the board of trustees and by the stockholders of Washington-Oregon corporation at respective meetings thereof duly called and held, which said resolutions of its stockholders were duly concurred in by the vote in person or by proxy of holders of more than two-thirds of the par value

of the issued capital stock of Washington-Oregon Corporation, the defendant, Washington-Oregon Corporation, duly made, executed and delivered to your orator as trustee its said mortgage or deed of trust dated the first day of April, 1911, wherein and whereby, in order to secure the payment of the [7] principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, it granted, bargained, sold, released, conveyed, assigned, transferred, and set over unto your orator as trustee, its successors and assigns forever, all the property described in paragraphs of said mortgage numbered "First" to "One Hundred and Twenty-fourth," inclusive, together with all its property, real or personal, rights, privileges and franchises of every kind and nature whatsoever, and the rents, issues and profits thereof, then owned or thereafter to be acquired by it; to have and to hold all of the property described in said mortgage unto your orator, as trustee, and its successors and assigns forever, in trust, to secure the payment equitably and ratably, without preference or priority of one kind over another of said bonds. A true copy of said mortgage is annexed to this Bill of Complaint as a part hereof, marked exhibit "A," which your orator prays may be taken in all respects as if fully set forth in the body of this Amended and Supplemental Bill.

Tenth. That said mortgage was duly authorized, made, executed and delivered in all respects in con-

formity with law, and your orator duly accepted the trust created by and in said mortgage which was duly filed for record as a real and chattel mortgage in all the counties of said States of Washington and Oregon in which the property pledged by said mortgage was situated, to wit: In the office of the Recorder of Conveyances in and for the county of Columbia, State of Oregon, on the twenty-sixth day of May, 1911, at 9:30 o'clock in the forenoon thereof, and recorded in the Records of Mortgages of Real Property in Book R thereof, at page 547, and indexed in the general index of mortgages of personal property or chattel mortgages, as well as in the general index of mortgages of real property; in the office of the Recorder of Conveyances in and for the county of Washington, State of Oregon, on the twenty-sixth day of May, 1911, at [8] 3:15 o'clock in the afternoon of said day, and recorded in the Records of Mortgages of Real Property in said office in Book 61 thereof, at page 500, and indexed in the general index of mortgages of personal property or chattel mortgages, as well as in the general index of mortgages of real property; in the office of the county auditor of the county of Clark in and for the State of Washington, on the twenty-sixth day of May, 1911, at 4.20 o'clock in the afternoon of said day, and recorded in said office in the Records of Mortgages of Real Property, in Book 89 thereof, at page 302, and in the Records of Mortgages of Personal Property in Book G thereof, at page 217, a duplicate original of said mortgage being filed in a file kept in said office in accordance with the provisions of Section

8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; in the office of the county auditor in and for the county of Cowlitz in the State of Washington on the twenty-sixth day of May, 1911, at nine o'clock in the forenoon of said day and recorded in the Records of Mortgages of Real Property in Book 53 thereof, at page 120, and in the Records of Mortgages of Personal Property, in Book 16 thereof, at page 410, a duplicate original of said instrument being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; in the office of the county auditor of the county of Lewis, in the State of Washington, on the twenty-sixth day of May, 1911, at 3:15 o'clock in the afternoon of said day and recorded in said office in the Records of Mortgages of Real Property, in Book 70 thereof, at page 1, and in the Records of Mortgages of Personal Property in Book 9 thereof, at page 161, a duplicate of original of said instrument being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; and in the office of the county auditor of the county of Thurston, in and for the State of Washington, on the twenty-first day of August, 1911, at 4:25 o'clock in the afternoon of said day, in the Records of Mortgages of Real Property in Book 6 thereof, at page 321. [9]

Eleventh. Upon information and belief that forthwith upon the execution, delivery and recording said mortgage Washington-Oregon Corporation duly

executed bonds of the issue described in said mortgage of the aggregate par value of principal of \$1,500,000, all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and as so authenticated were duly issued and delivered by your orator in the manner provided in and by said mortgage. Upon information and belief that in or about the month of October, 1911, pursuant to the provisions of Article I of said mortgage, and pursuant to a duly executed order in writing of the treasurer of Washington-Oregon Corporation, stating the amount of bonds required, to wit, bonds of the par value of principal of \$200,000, and the purpose for which the same were required, to wit, in order to provide funds for the acquisition of certain property, for the construction of certain machinery and lines, and for future extensions, improvements and betterments to the property of Washington-Oregon Corporation then owned or thereafter to be acquired, and upon the delivery to your orator of a certified copy of a resolution of the board of trustees of Washington-Oregon Corporation duly passed at a meeting of its board of trustees at a meeting thereof duly called and held, authorizing the execution and delivery of such certificate, together with a sworn statement of the president or vice-president of Washington-Oregon Corporation that said bonds or the proceeds thereof were to be used for the purposes therein set forth, your orator duly certified and delivered to Washington-Oregon Corporation bonds of the par value of principal of \$200,000. All of which

said bonds, aggregating in par value one million seven hundred thousand dollars (\$1,700,000), with the exception of bonds of the par value of \$5,500, which are retained by Washington-Oregon Corporation, and bonds of the par value of \$131,000, which were duly retired by Washington-Oregon Corporation, in accordance with the provisions of said mortgage, are now outstanding, and your orator is informed and believes, and therefore avers, that said [10] bonds so issued and delivered, and all of them, to wit, bonds of the par value of principal of \$1,563,500, have been duly issued, negotiated and sold to divers persons who have thereby become bona fide holders thereof as purchasers of the same for value, and that all of said bonds are now, and since and prior to April 1st, 1914, have been outstanding, valid, binding and subsisting obligations of Washington-Oregon Corporation.

Twelfth. Your orator further alleges upon information and belief that subsequent to the execution, delivery and recording of said mortgage as aforesaid and prior to the commencement of this suit Washington-Oregon Corporation acquired in addition to the property owned by said corporation at the time of the execution of said mortgage, by several deeds under seal within such times duly executed and delivered to Washington-Oregon Corporation and, except as in "Schedule B" otherwise stated, within such times duly recorded in the proper offices in the several counties wherein the property conveyed by said respective deeds was situated, certain property, a description whereof, so far as known to your orator,

is contained in a certain schedule, marked exhibit "B," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof, and during said times Washington-Oregon Corporation may have acquired other additional property, the description whereof is unknown to your orator.

Thirteenth. Your orator further alleges upon information and belief that subsequent to the execution, delivery and recording of said mortgage, and subsequent to the commencement of this suit, Washington-Oregon Corporation acquired in addition to the property owned by said corporation at the time of the execution of said mortgage and in addition to the property described in said exhibit "B," by a deed under seal heretofore duly executed and delivered to Washington-Oregon Corporation and heretofore duly recorded in the proper offices in the several counties wherein the property conveyed by said deed was situated, certain property, a description whereof [11] is contained in a certain Schedule, marked exhibit "C," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof.

Fourteenth. Your orator further alleges upon information and belief that subsequent to the execution, delivery and recording of said mortgage and prior to the commencement of this suit and pursuant to the provisions contained in Article II of said mortgage, your orator, by an instrument in writing under seal duly made and delivered, duly released from the operation and effect of said mortgage or there was disposed of by Washington-Oregon Cor-

poration, the property described in a certain schedule marked exhibit "D," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof.

Fifteenth. That subsequent to the execution and recording of said mortgage and prior to the commencement of this suit the city of Centralia duly acquired, free from all incumbrances, the property described in a certain schedule, marked exhibit "E," which is annexed to this Amended and Supplemental Bill of Complaint and made a part hereof, which said last-mentioned property was thereupon duly released from the operation and effect of said mortgage.

Sixteenth. That on the first day of April, 1914, Washington-Oregon Corporation made default, in the payment of the installment of interest due on that day on all of said bonds issued and outstanding and secured by said mortgage as aforesaid; that Washington-Oregon Corporation has not provided any fund with which to pay the said installment of interest or any part thereof, and that the whole of said installment of interest remains due and unpaid.

Seventeenth. That pursuant to the provisions of Article VII of said mortgage the holders of a majority in value of the outstanding bonds secured by said mortgage on or about the twentieth day of July, 1914, duly elected and duly notified in writing Washington-Oregon Corporation and your orator that they elected that the whole principal of all bonds secured by said mortgage should forthwith be declared in writing by your orator to be and should

immediately become due and payable, and thereupon and on or about the twentieth day of July, 1914, your orator duly declared in writing and notified Washington-Oregon Corporation that the whole principal of all the bonds secured by said mortgage was forthwith due and payable.

Eighteenth. That on or about the twentieth day of July, [12] 1914, in accordance with the provisions of Article VII of said mortgage the holders of a majority in value of the outstanding bonds secured by said mortgage duly requested your orator, by an instrument in writing signed by them, to enforce their rights under said mortgage and to institute proceedings for the foreclosure of the property mortgaged and pledged to your orator by said mortgage.

Nineteenth. That each of the defendants, Washington-Oregon Corporation, C. F. Cook, Joseph Smith, John Kesser, Robert Jeffrey and Willis D. Hoag and the intervenor, Philadelphia Trust Safe Deposit & Insurance Company has or claims to have some interest or lien in the property or a part thereof, pledged by said mortgage, which interest, if any, is subsequent and subordinate to the lien of said mortgage.

Twentieth. That is is provided in Article X of said mortgage that upon the filing of the bill in equity or commencement of other judicial proceedings to enforce the rights of your orator as trustee and of the bondholders under said mortgage, your orator shall be entitled to the appointment of a receiver or receivers of the property pledged by said mort-

gage and of the tolls, earnings, income, rents, issues and profits thereof pending such proceedings with such powers as the Court making such appointment shall confer.

Twenty-first. Your orator alleges that on or about the 31st day of July, 1914, your orator duly filed in this court its bill of complaint herein.

Twenty-second. Your orator alleges that on or about the 31st day of July, 1914, the Honorable Edward E. Cushman, one of the judges of the District Court of the United States in and for the Western District of Washington, duly signed an order, which was on said last-mentioned day duly filed and entered in this Court, appointing Elmer M. Hayden temporary receiver of all of the property of Washington-Oregon Corporation covered by said mortgage [13] situated in the States of Washington and Oregon, a copy of which last-mentioned order marked exhibit "F" is annexed to this Amended and Supplemental Bill of Complaint; that a certified copy of said last-mentioned order was duly served on defendant Washington-Oregon Corporation on or about the 1st day of August, 1914; that on or about the 31st day of July, 1914, said Elmer M. Hayden duly executed a bond, with good and sufficient surety duly approved by said Honorable Edward E. Cushman, in the sum of \$25,000 in accordance with the terms of said last-mentioned order. That said Elmer M. Hayden forthwith took possession of said property as temporary receiver and ever since has held possession thereof as temporary receiver pursuant to said order

and pursuant to the order referred to in paragraph Twenty-fifth hereof.

Twenty-third. Your orator alleges upon information and belief that at the time of the filing of said Bill of Complaint Washington-Oregon Corporation was insolvent; that Washington-Oregon Corporation defaulted in the payment of taxes upon its property for the year 1913, in an amount exceeding \$25,000, and that it was necessary for your orator, under the provisions of said mortgage, to pay said taxes together with the accrued interest and penalties thereon, said payments aggregating the sum of \$25,902.68, whereof \$5,319.50 was paid on June 10th, 1914, and whereof \$20,583.18 was paid on July 13, 1914, in order to prevent sales of property of Washington-Oregon Corporation by the sheriffs of the respective counties, in which such taxes were assessed and imposed, and in which said property was situated; that Washington-Oregon Corporation made default in the payment of the installment of interest due on July 1st, 1914, upon the principal amounting to \$350,000, secured by a certain mortgage made by Twin City Light and Traction Company to Standard Trust Company, of New York, as trustee, which last-mentioned mortgage is more particularly [14] described in said mortgage to your orator, said installment of interest amounting to the sum of \$10,500; that Washington-Oregon Corporation defaulted in the payment of the installment of interest due April 1st, 1914, upon the principal amounting to \$400,000, secured by a certain mortgage made by Washington-

Oregon Corporation to the Philadelphia Trust, Safe Deposit & Insurance Company, as trustee, dated the first day of April, 1913, and duly recorded in the proper offices in the counties of Washington and Oregon where the property described in said last-mentioned mortgage was situated, said installment of interest amounting to the sum of \$12,000; that Washington-Oregon Corporation defaulted in the payment of accounts due and payable exceeding the sum of \$50,000.

Twenty-fourth. Your orator alleges that on or about the 8th day of August, 1914, a duly certified copy of said Bill of Complaint and of said last-mentioned order was duly filed and entered in the United States District Court for the District of Oregon.

Twenty-fifth. Your orator alleges that on or about the 17th day of August, 1914, the Honorable Edward E. Cushman, one of the judges of the United States District Court in and for the Western District of Washington, duly signed an order, which was on or about said last-mentioned day duly filed and entered in this court continuing said Elmer M. Hayden as temporary receiver of all of the property of Washington-Oregon Corporation covered by said mortgage situated in the States of Washington and Oregon, until the further order of said last-mentioned court, with the same powers and authority conferred by said order of July 31st, 1914.

Twenty-sixth. Your orator further alleges that heretofore and on or subsequent to the 17th day of August, 1914, the following persons and corpora-

tions have by several orders filed in this court intervened in this suit: John Kiernan, C. E. Moulton, E. W. [15] Haines, A. Welch, W. J. Patterson, F. W. Effinger, William Pollman, J. H. Elwell, The Vancouver Townsite Company, John H. Norris, John W. Sifton, H. A. Moore, Pacific States Fire Insurance Company, Hannah N. Price, L. M. Hidden, E. M. Rands, M. M. Connor, A. B. Eastham, Ashley & Rumelin, a corporation, Jack Veness. Philadelphia Trust, Safe Deposit & Insurance Company, Portland Wood Pipe Company, B. K. Knapp, Portland Iron Works, Western Electric Company, John A. Roebblings Sons Company, Crane Company, Monarch Coal Company.

Twenty-seventh. Your orator further shows that except as stated in paragraphs "twenty-first" to "twenty-sixth" hereof inclusive, no proceedings at law or in equity have been begun or commenced by your orator, or, as your orator is informed and believes, by any holder of any of the bonds secured by said mortgage, or of any coupon thereto annexed, to enforce the payment of the sums so covenanted to be paid by Washington-Oregon Corporation under the terms of said mortgage, and that the amount of the controversy in this suit exceeds \$3,000 exclusive of interest and costs.

WHEREFORE and forasmuch as your orator is remediless in the premises according to the strict rules of common law and can have relief only in a court of equity where matters of this kind are properly cognizable your orator prays equitable relief, as follows:

1. That said defendants, Washington-Oregon Corporation, Willis D. Hoag, C. E. Cook, Joseph Smith, John Kesser and Robert Jeffrey, may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and as particularly as if they were herein expressly and particularly interrogated concerning the same, but not under oath, answer under oath being hereby expressly waived. [16]

2. That a decree be made directing that all properties real and personal, acquired by or on behalf of Washington-Oregon Corporation since the recording of said mortgage shall be taken to be subject to the lien and remedies provided for by such mortgage as fully and completely as though particularly described therein.

3. That a decree be made that the lien of said mortgage be established as a lien upon all the premises, franchises and other property, real and personal in said mortgage described; that said mortgage is a lien upon all property, real and personal, acquired by Washington-Oregon Corporation since the recording of said mortgage, whether hereinbefore described or otherwise, superior to the claim, if any, of each and all of the defendants and of the intervenor Philadelphia Trust, Safe Deposit & Insurance Company and of all other claims, liens and encumbrances created subsequent to the recording of said mortgage and that the rights of all holders of bonds issued under said mortgage, in any and all the property, real and personal, of Washington-Oregon Corpora-

tion, mortgaged to secure the same, may be ascertained.

4. That a decree be made fixing the amount due upon said mortgage bonds outstanding, principal and interest secured by said mortgage, and of the expenses, compensation and fees of the trustee and its solicitors and counsel.

5. That a decree be made that the defendant Washington-Oregon Corporation, do pay what shall appear to be due upon the ascertainment of all principal and interest unpaid upon said bonds and all expenses, compensation and fees of your orator as trustee and of its solicitors and counsel before the actual sale of the mortgaged premises under such decree, together with said sums aggregating \$25,902.68 expended by your orator for the payment of taxes as aforesaid, and interest thereon at five per cent per annum. [17]

6. That a decree be made that in case the amount thus ascertained to be due as principal and interest upon the bonds outstanding and secured by said mortgage and for expenses, compensation and fees and for the payment of taxes and interest as aforesaid shall not be paid to your orator within the time to be limited by decree of your Honorable Court, the defendants, Washington-Oregon Corporation, C. E. Cook, Joseph Smith, John Kesser, Robert Jeffrey and Willis D. Hoag, and the intervenor Philadelphia Trust, Safe Deposit & Insurance Company, and all persons claiming under them or any of them any interest in said mortgaged property, and that all per-

sons making claims as supply creditors or otherwise, to priority over said mortgage and all persons claiming under them or any of them, be absolutely barred and foreclosed of every right or equity of redemption of, in and to the property conveyed by said mortgage or since acquired by or on behalf of Washington-Oregon Corporation and now held under said mortgage, and that a sale of the whole of the mortgaged property in one lot or parcel and without any right of redemption be ordered in accordance with the law and practice of this Honorable Court, and that the proceeds of such sale may be applied; first, to the expenses of this suit and the compensation and disbursements of your orator as trustee in the execution of its trusts, the compensation of its solicitors and counsel; next to the payment to your orator of said amounts expended by your orator for the payment of taxes as aforesaid with interest thereon from the time of such payments; next, to the payment of the amounts found to be due and unpaid upon the bonds outstanding and secured by said mortgage, and the balance, if any, as the court may direct.

7. That a decree be made that if the proceeds of sale shall be insufficient for the payment of such expenses, compensation and fees and costs of sale, said amounts expended for the payment of [18] taxes and all of the principal and interest of said outstanding bonds issued under said mortgage as aforesaid, the defendant, Washington-Oregon Corporation may be adjudged to pay any deficiency thereof.

8. That a decree be made that at said sale the purchase money may be paid either in cash or by owners of bonds secured by said mortgage in bonds to such extent as said bonds shall be entitled to payment in cash out of the proceeds of sale.

9. That pending this suit a writ of injunction may be issued out of and under the seal of this Honorable Court directing, enjoining and restraining the said defendant, Washington-Oregon Corporation, its officers, agents and all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property secured by said mortgage.

10. That an order or decree be made appointing a receiver with the usual powers of receivers in like cases of the property pledged by said mortgage, and of the tolls, earnings, income, rents, issues and profits thereof, and to preserve and operate said property and to collect such tolls, earnings, income, rents, issues and profits pending the sale thereof pursuant to the decree of this Honorable Court, and to hold and dispose of such tolls, earnings, income, rents, issues and profits as this Honorable Court may direct.

11. That your orator may have such other and further relief as to this Honorable Court shall seem just.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this Amended and Supplemental Bill of Complaint to be issued to said Washington-Oregon Corporation, but also a writ of subpoena directed to

said defendants, Washington-Oregon Corporation, C. E. Cook, Joseph Smith, John Kesser, Robert Jeffrey and Willis D. Hoag, commanding them and [19] each of them at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court then and there to answer the premises and to abide by the order and decree of the Court herein and that they may appear herein according to law.

FIDELITY TRUST COMPANY.

By RANDOLPH W. CHILDS,

Solicitor.

RANDOLPH W. CHILDS,

Solicitors for Complainant.

(Verified.)

Filed Nov. 9, 1914. [20]

Answer of Defendant Washington-Oregon Corporation, to Amended Bill.

Comes now the Washington-Oregon Corporation, one of the defendants above named, and makes the following answer to the amended and supplemental bill of complaint herein:

I.

This defendant admits all and singular the allegations of the amended and supplemental bill of complaint herein.

WHEREFORE, this defendant, Washington-Oregon Corporation, prays that this court will grant such relief in the premises as may be just and equitable.

Dated this 1st day of April, 1915.

WASHINGTON-OREGON CORPORATION.

By CHAS. S. LYONS,

Solicitor for Defendant Washington-Oregon Corporation.

(Filed Apr. 2, 1915.) [21]

Order (Permitting Crane Co. to File its Intervening Petition Herein).

Now at this time came on regularly to be heard the motion of Crane Co., a corporation, to file its petition of intervention in the above-entitled suit, the said Crane Co., a corporation, appearing by its attorneys, Seitz & Clark of Portland, Oregon, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, That the said Crane Co., a corporation, be and it is hereby permitted and allowed to file its petition of intervention in the above-entitled suit and that the said Crane Co., a corporation, forthwith serve a copy of its said intervention upon the complainant in the above-entitled suit and that the rights of the said complainant to answer, move to dismiss or further plead with respect to said petition be and they hereby are reserved.

Dated at Tacoma, Washington, this 14th day of September, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Sept. 14, 1914.) [22]

**Order (Permitting Crane Co. to File Its Amended
Petition of Intervention Herein).**

This cause coming on this day to be heard on motion of Crane Co., intervenor herein, for leave to file its amended petition; and it appearing to the Court that the parties hereto have stipulated and agreed that said Crane Co. may file its said amended petition,

NOW THEREFORE IT IS ORDERED That the said Crane Co. be and it is hereby given leave to file its amended petition herein.

Dated this 1st day of March, A. D., 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Mar. 1, 1915.) [23]

Amended Intervening Petition of Crane Co.

Comes now Crane Co. by leave of court first had and obtained and files its amended intervening petition herein and respectfully represents unto the court as follows:

I.

That it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, Illinois, and that it is and was during all the time herein stated duly registered and authorized to do business in the States of Washington and Oregon, and that it was and is among other things engaged in the manufacture and sale of the

merchandise hereinafter mentioned.

II.

That the defendant Washington-Oregon Corporation is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is engaged in the business occupations and pursuits hereinafter stated.

III.

That the Fidelity Trust Company, the plaintiff, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania.

IV.

That at all of the times herein stated the said Washington-Oregon Corporation was and is authorized to acquire, lease, construct, own, hold, maintain, use and operate in the public streets and ways and elsewhere within the States of Washington and Oregon, electric railways and railroads and to generally engage in the business of a common carrier of both [24] freight and passengers within said States; that said corporation was and is further authorized to own, hold, maintain, use, and operate power plants for the manufacture, generation, production and sale of electricity and electrical energy for commercial and other purposes and to transmit the same through, upon, along and *other* public highways, private ways and private lands throughout said States, and to supply cities, towns and municipal corporations in the States of Washington and Oregon with water power water, electric lights, power and energy, and to own and hold the necessary

equipment, lines, tracts and stations to conduct and operate said businesses, and to acquire, secure, own, and hold franchises and other public rights from various towns, cities, and municipal corporations throughout said States; that the said Washington-Oregon Corporation was during all of the time and times herein stated and now is engaged in the businesses, occupations and pursuits hereinbefore stated, owning, holding and operating under franchises from cities and towns throughout said States of Washington and Oregon.

V.

That on or about the 20th day of May, 1911, the said Washington-Oregon Corporation made and executed a mortgage to the said Fidelity & Trust Company; that said mortgage was executed to the said Fidelity & Trust Company, as trustee, to secure a bond issue of the said Washington-Oregon Corporation, a corporation, to the amount of Five Million (\$5,000,000) Dollars; that said bonds issued and to be issued were to bear and bore interest at the rate of six per cent (6%) per annum, payable semi-annually, on the 1st day of April and the 1st day of November of each year; that said mortgage covered and constituted a lien to the amount of any and all bonds issued and [25] outstanding, on all of the visible and tangible rights, franchises and property then owned by the said Washington-Oregon Corporation, a corporation, as hereinbefore described, and that thereafter might be required by it; that said mortgage was duly filed and recorded in the various counties of the States of Oregon and Wash-

ington where the said Washington-Oregon Corporation, a corporation, holds or owns property or franchises.

VI.

That on the 31st day of July, 1914, the said Fidelity & Trust Company, acting in its capacity as Trustee under said mortgage, and on behalf of the holders of said bonds filed its complaint in this court in the usual form setting out the execution and recording of said mortgage and the properties covered thereby, and alleging a default of said mortgage among other things in the payment of interest accrued thereon, and praying that said mortgage be decreed a first and valid lien on all of said rights and properties of the said Washington-Oregon Corporation, a corporation, and that the same be foreclosed and said rights and properties sold under a decree of said court to satisfy claims of said bond holders; that reference is hereby made to the original complaint on file herein for the specific allegations thereof describing said property and setting out the default of the said Washington-Oregon Corporation, a corporation therein, which said allegations of said complaint are hereby made a part of this petition; that pending said foreclosure proceedings or a satisfactory adjustment thereof and disposition of said properties that a receiver be appointed to take charge of said properties of the said Washington-Oregon Corporation, a corporation, and to operate the same under the instructions and orders of said Court. [26]

VII.

That in accordance with the prayer of said complaint on the 31st day of July, 1914, one Elmer M. Hayden, of Tacoma, Washington, was appointed by said Court receiver of said properties of the said Washington-Oregon Corporation, a corporation, with the usual powers of a receiver in such cases to operate and conduct the business of said corporation under the orders and instructions of said Court; that said receiver is now and has since his appointment been, in charge of the operation and management of said property and has operated and is now operating and conducting the same.

VIII.

That your petitioner Crane Co. at divers times between the 1st day of January, 1911, and the 31st day of May, 1914, both inclusive, sold and delivered to the said Washington-Oregon Corporation a corporation, at its special instance and request, goods, wares and merchandise; that said goods, wares and merchandise were sold upon orders or requisitions issued by the said Washington-Oregon Corporation, a corporation; that the dates upon which said goods, wares and merchandise were furnished and the agreed and reasonable amount thereof is in accordance with the exhibit hereto attached, marked exhibit "A" and by reference made a part hereof; that thereafter beginning with the 5th day of April, 1911, and ending with the 31st day of May, 1914, the said Washington-Oregon Corporation made certain payments and were given certain credits to apply on

said account, said payments and credits being in accordance with exhibit "B" hereto attached and by reference made a part of this petition; that on June 1, 1914, a balance was struck between your petitioner and the Washington-Oregon Corporation, and on [27] said date there was found to be due from the said Washington-Oregon Corporation to your petitioner the sum of Thirteen Thousand Two Hundred Twenty-three and 25/100 (\$13,223.25) Dollars, and that to evidence said indebtedness on said date the said Washington-Oregon Corporation executed its promissory notes six (6) in number, payable to the order of your petitioner at future dates, aggregating said amount, one of which said notes was thereafter, to wit, on July 7, 1914, paid; that the unpaid notes issued by the said Washington-Oregon Corporation, as aforesaid, are in accordance with the exhibits hereto attached, marked exhibit 1 to 5 inclusive and by reference made a part of this petition; that thereafter and between the 1st day of June, 1914, and the 15th day of July, 1914, inclusive, additional goods, wares and merchandise were sold and delivered by your petitioner to the Washington-Oregon Corporation, of the agreed and reasonable value of Fifty-eight and 68/100 (\$58.68) Dollars upon which the sum of Two and 65/100 (\$2.65) Dollars was paid on June 1, 1914, leaving a balance due and unpaid of Fifty-six and 03/100 (\$56.03) Dollars; that said goods, wares and merchandise were furnished at the time and in the amounts as set forth in exhibit "C" hereto attached and by reference made a part hereof.

IX.

That said goods, wares, and merchandise furnished by your petitioner to the said Washington-Oregon Corporation, a corporation, as aforesaid, consisted of repairs, equipment and materials necessary to be used, and which were accepted and used by the said Washington-Oregon Corporation, a corporation, in the repair and maintenance and conduct of its power, gas and electric plants, railroads, and railways and waterworks throughout said States of Washington and Oregon, and in making [28] necessary improvements and additions thereon and thereto, and were necessary to the business of said corporation, and the preservation of its property and to maintain and continue it as a going concern; that without the use of said goods, wares and merchandise furnished by your petitioner as aforesaid, it would have been impossible and impracticable for the said Washington-Oregon Corporation, a corporation, to have conducted or operated its said business.

X.

That the repairs, equipment and materials furnished by your petitioner as aforesaid have greatly and permanently enhanced and increased the value of the properties and assets of the said Washington-Oregon Corporation, and which are included in said mortgage, and were as hereinbefore stated, necessary to continue said corporation as a going concern, and thus conserve and protect the property, franchises and assets of said corporation, which otherwise would have become wasted and forfeited.

XI.

That the said Washington-Oregon Corporation, a corporation, is and was a public service corporation, and the convenience, interest and welfare of the public demanded, and the said Fidelity Trust Company, and the holders of said bonds and other parties interested therein, contemplated that the business of said corporation be continued and that it be maintained as a going concern, and that in the maintenance of said corporation as such going concern, it was imperative and necessary that repairs, equipment and materials be furnished to said corporation from time to time as its business and necessities demanded. [29]

XII.

That said goods, wares and merchandise, appliances and repairs furnished by your petitioner as aforesaid were furnished to the said Washington-Oregon Corporation, a corporation, upon the understanding that the same would be paid out of the current income of said corporation and to that end your petitioner permitted said account to continue as a running account, and to accept thereon such payments as the Washington-Oregon Corporation declared its ability to make, and that your petitioner relied upon a continuance of the business of the said Washington-Oregon Corporation, and that said current income would be applied toward the payments of the amounts due your petitioner as aforesaid.

XIII.

That your petitioner is informed and believes, and therefore states the facts to be that the current in-

come of the said Washington-Oregon Corporation, a corporation, has not been used in the payment of current expenses, including your petitioner's claim, but on the contrary the same has been wrongfully and improperly diverted for the payment of interest on said bonded indebtedness and for permanent extensions and improvements on said property, which have largely and greatly increased the assets of the said Washington-Oregon Corporation, and likewise the security under said mortgage.

XIV.

That the said Washington-Oregon Corporation at and during all of the times herein stated was operating and conducting its said electric light *platns*, power plants, water works, gas plants and electric railroads and railways [30] throughout said States of Washington and Oregon as a single unit, and all of the funds derived from the operation of its several and respective properties were mixed and mingled as a common fund, out of which it was agreed and understood that the claim of your petitioner should and would be paid; that said fund diverted as hereinbefore stated has been more than sufficient to pay your petitioner's claim.

XV.

That by reason of the fact that said goods, wages and merchandise were furnished by your petitioner for the purpose aforesaid, and because of the fact that the furnishing of said merchandise enabled the said Washington-Oregon Corporation to continue as a going concern, and thus enable it to perform its obligations to the public as a public service corpora-

tion and preserve its assets and franchises, and because of the fact that the said goods, wares and merchandise have greatly increased the value of said properties, your petitioner has, and in equity and good conscience should have, a first and prior lien to said mortgage on the said property of the said Washington-Oregon Corporation, and on the income of said receivership, and upon the moneys received by said Washington-Oregon Corporation, and improperly diverted as aforesaid to the amount of your petitioner's claim as hereinbefore stated.

XVI.

That the said Washington-Oregon Corporation, a corporation, is insolvent; that the only property and assets out of which or upon which your petitioner could satisfy its claim are included in said mortgage, and unless your petitioner may be decreed to have a first and prior lien upon said [31] income and property as hereinbefore stated, your petitioner will lose the amount of its said claim; that because thereof your petitioner has no adequate or speedy remedy a law.

WHEREFORE, your petitioner prays that it be allowed to file this its intervening petition in this cause and that its claim in the amount of Eleven Thousand Two Hundred and Two and 70/100 (\$11,202.70) Dollars be decreed to be superior and prior lien to said mortgage, and the claim of complainant to this suit; that the said complainant and said receiver be compelled to pay out of the earnings of receivership or out of money in their hands or

from the moneys wrongfully diverted as hereinbefore stated the amount of your petitioner's claim, and that in the event the same is insufficient to pay your petitioner's claim and in the event of a sale of the property under a decree in this suit that the proceeds of any such sale or sales shall be applied first to the payment of the claim of your petitioner; and that your petitioner may have such other and further relief as may be agreeable in equity and as to the Court may seem meet, including the costs and disbursements incurred by your petitioner herein.

SEITZ & CLARK,

Attorneys for Crane Co., Petitioner.

(Verified.) [32]

Exhibit "A" [to Amended Intervening Petition of Crane Co.].

1911		1911 (Cont.)	
Jan. 20	\$1,029.25	May 1	\$247.04
" 25	18.90	" 1	6,246.52
Feb. 1	6.39	" 4	7.75
" 6	96.26	" 4	399.60
" 16	33.59	" 6	54.22
" 21	.45	" 9	132.15
" 25	211.16	" 10	9.45
Mar. 1	16.11	" 10	9.45
" 1	108.34	" 10	195.89
" 4	22.75	" 10	5.70
" 7	3.74	" 12	90.70
" 8	1,663.43	" 12	10.58
" 11	101.02	" 13	379.32
" 9	126.06	May 12	116.18
" 20	23.93	" 18	1,231.90
" 22	212.21	" 20	108.23
" 22	29.18	" 15	12.12
" 23	22.20	" 20	216.83
" 28	6.93	" 17	2,108.78
" 25	1.44	" 22	8.53
" 29	124.27	" 22	203.23
" 30	1,482.06	" 23	1.38
Apr. 1	3.37	" 23	6.59
" 1	224.45	" 18	3,770.03
" 4	31.10	" 24	182.66
" 5	113.83	" 23	550.95
" 6	136.56	" 24	36.45
" 8	18.90	" 24	25.01
" 8	397.93	" 25	165.33
" 10	.60	" 25	6.60
" 12	146.39	" 26	48.20
" 13	3.68	" 27	100.66
" 15	2.31	" 27	122.40
" 10	100.12	" 27	198.66
" 19	10.80	June 1	101.82
" 20	265.76	May 31	38.88
" 21	398.83	June 2	146.70
" 21	29.14	" 2	1.30
" 15	3,711.00	" 1	86.40
" 14	.68	" 3	31.96
" 21	2,644.05	May 25	32.08
" 25	50.98	June 1	3.00
" 27	223.20	" 2	209.37
" 27	175.89	" 3	3.15

1911 (Cont.)		1911 (Cont.)	
June 1	\$20.57	June 14	\$12.70
" 1	67.10	" 14	113.14
June 1	1,866.23	" 14	107.60
" 1	106.36	" 8	24.30
" 1	61.88	" 14	14.21
" 1	9.93	" 15	612.43
May 30	73.80	" 17	1.65
June 1	2,460.00	" 17	6.48
" 6	58.80	" 19	7.80
" 6	5.04	" 14	4.97
" 6	37.62	" 14	3,726.97
" 6	68.15	" 19	17.60
" 6	16.50	" 20	327.60
" 6	9.79	" 20	11.88
" 6	7.20	" 20	91.34
" 2	2.25	" 20	9.76
" 7	6.47	" 21	.50
" 7	11.10	" 22	12.72
" 7	3.50	" 22	258.97
" 7	544.96	" 22	118.11
" 7	21.45	" 22	715.64
" 7	10.18	" 23	78.03
" 7	55.33	" 24	26.17
" 7	43.73	" 23	44.08
May 18	10.80	" 23	206.04
June 8	120.03	" 24	45.78
[33]			
June 8	69.26	" 26	12.43
" 8	88.50	" 26	65.54
" 8	8.06	" 26	41.04
" 9	1.53	" 27	207.44
" 10	22.43	" 28	28.73
" 10	17.06	" 28	12.38
" 10	746.84	" 15	30.31
" 10	10.34	" 28	68.29
" 10	34.65	June 30	51.75
" 10	11.00	July 1	18.24
" 10	22.00	" 1	163.22
" 13	13.50	" 1	45.00
" 13	55.60	" 27	99.72
" 13	9.35	July 1	80.64
" 12	191.63	" 1	210.75
" 5	6,245.10	" 5	174.46
" 13	6.60	" 6	63.34
" 13	3.96	" 6	110.73
" 13	23.65	" 7	214.00
" 9	2,048.43	" 7	234.00
" 14	67.37	" 8	43.43
" 14	153.73	" 7	290.03
" 14	2.00	" 8	18.14

1911 (Cont.)		1911 (Cont.)	
July 10	\$155.96	July 31	\$123.00
" 11	11.76	" 31	63.21
" 12	112.22	Aug. 1	24.00
" 13	17.25	" 1	47.14
" 13	4.68	" 1	13.68
" 13	50.40	" 1	72.96
" 14	17.20	" 1	1.22
" 11	45.24	" 1	38.80
" 14	95.00	" 1	31.27
" 14	226.41	" 3	44.83
" 15	47.57	" 1	15.10
" 15	4.86	" 3	15.15
" 17	12.49	" 3	33.66
" 17	65.04	" 3	13.33
" 17	29.91	" 4	261.58
" 17	772.83	" 8	38.45
" 17	55.43	" 8	102.92
" 18	40.32	" 8	800.88
" 18	304.52	" 9	126.00
" 19	69.81	" 9	99.00
" 20	247.56	" 9	29.19
" 20	45.91	" 10	216.51
" 20	9.16	" 10	48.43
" 20	52.92	" 10	239.62
" 22	8.48	" 11	46.04
" 22	489.96	" 12	303.87
" 22	980.17	" 14	6.32
" 22	6.32	" 14	58.23
" 21	43.20	" 16	32.06
" 21	9.36	" 16	48.82
" 21	145.79	" 17	.35
" 24	4.79	" 19	14.23
" 24	3.50	" 13	65.75
" 24	47.60	" 21	7.95
" 24	16.22	" 22	93.75
" 25	164.29	" 23	3.48
" 20	2.02	" 24	31.50
" 26	1.80	24	2,171.46
" 26	151.24	" 24	44.61
" 24	12.87	" 24	8.10
" 27	17.99	" 25	168.04
[34]			
July 27	1,117.79	" 26	25.68
" 27	19.65	" 29	10.50
" 27	32.40	" 29	3.16
" 27	22.20	" 29	48.02
" 27	11.40	" 30	15.30
" 27	4.56	" 30	4.88
" 29	10.06	" 30	7.63
" 29	15.75	" 31	184.00

Crane Company vs.

1911 (Cont.)		1911 (Cont.)	
Sept. 1	\$34.63	Oct 31	\$228.90
" 1	26.87	Nov. 1	26.55
" 1	143.55	" 1	9.24
" 5	514.14	" 1	17.26
Aug. 31	13.23	" 11	2.29
Sept. 7	13.68	" 21	1.88
" 7	93.43	" 22	.65
" 7	90.00	" 24	30.58
" 7	157.50	" 30	234.65
		[35]	
" 7	26.60	Dec. 1	92.64
" 7	57.57	" 2	328.59
" 7	2.91	" 5	514.55
" 11	9.02	" 6	575.54
" 12	57.20	" 9	34.16
" 12	18.13	" 12	41.08
" 13	45.43	" 16	71.98
" 14	138.59	" 18	93.51
" 14	22.63	" 27	128.22
" 14	44.54	" 31	228.64
" 19	2.01		
" 20	4.05	1912.	
" 20	138.52	Jan. 3	57.30
" 20	111.51	" 3	396.05
" 26	45.22	" 9	3.34
" 30	198.80	" 13	24.29
Oct. 2	.75	" 15	3.77
" 2	15.95	" 16	2.16
" 3	75.14	" 18	.64
" 3	8.40	" 18	34.68
" 4	42.83	" 19	9.54
" 13	3.32	" 22	46.48
" 14	280.12	" 22	41.31
" 14	157.50	" 24	90.50
" 14	107.10	" 27	27.36
" 17	155.85	" 31	185.90
" 17	12.76	" 31	115.64
" 17	24.50	" 31	208.82
" 18	71.55	Feb. 1	103.91
" 18	12.22	" 1	22.57
" 18	551.02	" 1	8.95
" 19	14.00	" 3	152.30
" 19	45.50	" 5	76.75
" 20	25.17	" 7	130.72
" 18	30.78	" 6	27.84
" 18	18.77	" 8	47.37
" 26	13.50	" 14	3.00
" 27	1.65	" 23	18.72
" 28	33.75	" 24	528.00
" 28	4.48	" 27	10.90
		" 29	174.65

Fidelity Trust Company et al.

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1912 (Cont.)		1912 (Cont.)	
Feb. 29	\$11.91	June 15	\$222.18
Mar. 9	317.07	" 1	1.50
" 12	189.63	" 18	1,202.48
" 13	3.60	" 19	176.80
" 15	58.80	" 22	17.89
" 16	109.25	" 22	887.16
" 20	.55	" 20	2.80
" 21	75.58	" 19	535.28
" 21	.50	" 19	1,868.70
" 23	2.55	" 25	110.87
" 25	4.68	" 26	1,680.04
" 29	56.67	" 26	168.55
" 31	148.05	" 30	137.75
Apr. 3	148.27	" 30	123.69
" 4	222.88	July 1	28.50
" 5	3.94	" 1	28.50
" 2	1.05	" 1	33.95
" 8	4.25	" 1	18.30
" 16	1,433.50	" 1	9.10
" 22	100.45	" 10	45.00
" 24	53.00	" 12	79.58
" 24	64.93	" 15	485.30
" 30	140.75	" 16	561.91
May 1	32.48	" 16	186.36
" 4	380.63	" 16	110.14
		[36]	
" 6	231.20	July 17	13.16
" 8	4.73	" 20	66.78
" 8	11.82	" 23	392.40
" 11	95.72	" 23	85.50
" 14	43.44	" 25	75.54
" 17	356.70	" 25	5.60
" 17	41.72	" 29	42.75
" 20	130.41	" 29	116.41
" 20	260.30	" 30	41.76
" 20	171.38	" 30	15.39
" 9	49.00	" 31	151.54
" 16	9.00	Aug. 1	28.55
" 23	7.90	" 5	17.10
" 23	9.46	" 12	16.51
" 24	63.82	" 31	166.60
" 29	20.45	Sept. 30	193.34
" 31	133.00	Oct. 8	117.04
June 4	38.29	" 8	88.48
" 6	9.41	" 9	130.39
" 8	6.08	" 9	7.37
" 8	1.46	" 10	45.00
" 10	13.65	" 11	5.40
" 10	266.00	" 17	441.70
" 12	39.00	" 12	298.11
" 12	2.88	" 31	165.73

Crane Company vs.

1912 (Cont.)		1913 (Cont.)	
Nov. 1	\$68.48	May 6	\$1.88
" 1	62.69	" 9	45.90
" 1	4.23	" 10	300.08
" 2	126.71	" 12	57.85
" 2	33.12	" 20	805.26
" 9	2.82	" 22	16.95
" 6	9.19	" 22	551.11
" 12	47.50	" 31	75.15
" 12	25.55	June 2	1.07
" 19	10.94	" 12	25.20
" 19	39.67	" 25	18.00
" 18	4.50	" 27	78.59
" 21	79.80	" 30	92.05
" 30	158.37	July 19	49.35
Dec. 9	92.26	" 22	6.84
" 10	38.80	" 21	117.75
" 28	216.41	" 24	15.46
" 28	62.06	" 31	93.50
" 31	150.95	Aug. 1	125.75
1913.		" 5	3.74
		" 31	94.21
		Sept. 30	91.90
Jan. 21	15.00	Oct. 31	88.50
" 23	14.86	Nov. 5	.49
" 31	151.98	" 8	62.12
Feb. 3	4.35	" 8	64.09
" 10	.43	" 11	163.87
" 28	128.00	" 30	87.20
Mar. 3	15.69	Dec. 1	1.18
" 4	112.73	" 31	86.06
" 5	15.96		
" 11	6.27		
Mr. 19	19.88		
" 12	45.00		
" 20	21.08	1914.	
" 27	214.62	Jan. 31	86.65
" 31	83.60	Feb. 2	38.38
Apr. 22	127.93	" 28	87.22
" 18	149.66	Mar. 6	21.28
" 30	71.65	" 9	71.16
" 25	176.84	" 31	88.05
May 1	53.44	Apr. 1	27.34
" 1	42.84	" 1	39.07
" 1	173.89	" 21	55.20
" 1	111.24	" 30	88.66
" 3	302.25	May 20	18.58
		" 31	89.25

Exhibit "B" [to Amended Intervening Petition of Crane Co.].

1911.		1912 (Cont.)	
Apr. 5	\$8.36	Aug. 31	\$44.43
" 20	22.20	Oct. 3	5,009.16
May 1	1,396.00	" 8	391.12
June 3	23.93	" 17	739.94
" 19	7,718.17	Nov. 1	386.59
July 21	110.92	" 12	78.65
" 21	6,526.69	" 16	2,539.47
" 21	40.93	" 19	50.61
Aug. 3	.38	" 20	2.43
" 4	2.27	Dec. 9	38.80
" 21	3,142.39	" 9	90.83
" 29	5,130.42	" 10	.45
" 21	42.68	" 28	277.80
" 30	314.10		
Sept. 12	5,239.95	Jan. 10	1.00
Oct. 13	2,644.05	" 23	29.86
" 5	29.50	Feb. 15	7,193.37
Nov. 2	390.09	" 3	4.35
" 18	5,000.00	" 6	112.40
Dec. 29	4,983.51	" 19	297.07
Nov. 15	12.22	Mar. 3	189.81
		" 6	.43
		" 12	5,068.57
Jan. 20	5,131.02	July 19	49.35
Feb. 6	23.31	" 22	6.84
" 29	4,985.92	" 25	117.75
Mar. 14	9.06	" 30	125.75
" 22	9.50	Aug. 5	49.35
" 26	58.95	Sept. 18	1,000.00
" 28	2,500.00	Nov. 7	284.55
Apr. 24	2,000.00	" 8	163.05
May 23	1,117.79	" 8	379.40
" 23	123.40	Dec. 13	5.53
July 10	97.80		
" 10	4.38		
" 10	47.37	1914.	
" 23	1.46	Mar. 6	92.74
Aug. 24	1,300.00	" 21	27.34
" 31	600.59	" 30	95.31
" 31	1,869.26	May 20	18.58
		" 26	250.00

[38]

Exhibit "C" [to Amended Intervening Petition of Crane Co.].

1914.	
June 1	2.65
" 24	26.80
July 15	29.23

[39]

\$2,500.00

June 1, 1914.

August 1, 1914. After date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, TWENTY-FIVE HUNDRED and no/100 ——— Dollars in Gold Coin of the United States of America, with interest, thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

————Due————

WASHINGTON-OREGON CORPORATION. [40]

\$2,500.00

June 1, 1914.

September 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Twenty-five Hundred and no/100 Dollars in Gold Coin of the United States of America, with interest, thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

————Due————

WASHINGTON-OREGON CORPORATION. [41]

\$2,000.00

June 1, 1914.

October 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Two Thousand and no/100——Dollars in Gold Coin of the United States of America, with interest, thereon in like Gold Coin at the rate 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

——Due——

WASHINGTON-OREGON CORPORATION. [42]

\$2,000.00

June 1, 1914.

November 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Two Thousand and no/100——Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

——Due——

WASHINGTON-OREGON CORPORATION. [43]

\$2,000.00

June 1, 1914.

December 1, 1914, after date, without grace, we promise to pay to the order of Crane Co. at Portland, Oregon, Two Thousand and no/100——Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 8 per cent per annum from date until paid for value received. Interest payable at maturity and in case suit or action is instituted to collect this Note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit or action.

————Due————

WASHINGTON-OREGON CORPORATION.

(Filed March 1, 1915.) [44]

Answer.

Comes now the Fidelity Trust Company, a corporation, by its solicitors, Randolph W. Childs, Maurice A. Langhorne and F. D. Metzger, and for answer to the complaint in intervention filed herein says:

I.

The complainant, Fidelity Trust Company, avers and alleges that the facts stated in said bill of intervention are insufficient in law or equity to entitle the intervenor to the relief prayed for in said bill of intervention, and complainant moves the Court to dismiss said bill for want of equity therein.

II.

Further answering said bill of intervention, this complainant specifically admits the allegations set forth in the paragraphs of said bill of intervention numbered I, II, III, IV, V, VI, and VII.

III.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered VIII complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

IV.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered IX complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

V.

For answer to the allegations set forth in the paragraph [45] of said bill of intervention numbered X complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

VI.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XI complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore

denies the same, except that it admits that a part of the business of said Washington-Oregon Corporation was that of a public service corporation and that the convenience, interest and welfare of the public would be furthered if the business of said corporation were continued and if the said corporation were maintained as a going concern and that if it continued its business it was necessary that repairs, equipment and materials should be furnished to said corporation from time to time as its business and necessities demanded.

VII.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XII complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

VIII.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XIII complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same, except that it denies that current income of said Washington-Oregon Corporation has [46] been wrongfully or improperly diverted for the payment of interest on said bonded indebtedness or for permanent extensions and improvements on said property.

IX

For answer to the allegations set forth in the

paragraph of said bill of intervention numbered XIV complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same, except that it admits that said Washington-Oregon Corporation at and during all of the times herein stated was operating and conducting such of its said electric light plants, power plants, water works, gas plants and electric railroads and railways as it owned at any of said times throughout said States of Washington and Oregon as a single unit and that all of the funds derived from the operation of its several and respective properties were mixed and mingled as a common fund.

X.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XV complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same.

XI.

For answer to the allegations set forth in the paragraph of said bill of intervention numbered XVI complainant denies that it has any knowledge or information of any of the allegations of said paragraph sufficient to form a belief thereof, and therefore denies the same, except that it admits that the said Washington-Oregon Corporation is insolvent.

XII.

This complainant denies that said intervenor is entitled to any relief whatsoever or any part of the relief in said complaint in intervention demanded and alleges that said intervenor has no standing in this court nor any court of equity.

XIII.

And this complainant prays in all things the same benefit and advantages of this answer as if it had moved to dismiss the said bill of intervention and every part thereof.

FIDELITY TRUST COMPANY.

RANDOLPH W. CHILDS.

By MAURICE A. LANGHORNE,

F. D. METZGER,

Its Solicitors.

(Verification.)

(Filed Oct. 3, 1914.) [48]

Stipulation (Re Answer).

IT IS HEREBY STIPULATED by and between the parties by their respective attorneys that the answer filed to the original bill of intervention by Crane Co. filed herein, may stand as the answer to the amended Bill of Intervention filed by Crane Co.

It is further stipulated that any and all affirmative matter set up in said answer is to be deemed denied by the intervenor, Crane Co.

Dated this — day of November, 1915.

RANDOLPH W. CHILDS,

Solicitor for Receiver and Fidelity Trust Co.

MAURICE W. SEITZ,

Solicitor for Crane Co.

(Filed Nov. 8, 1915.) [49]

Stipulation (of Facts).

The plaintiff, Fidelity Trust Company, Elmer M. Hayden, as temporary receiver in this suit, and the intervenor, Crane Co., for the purpose of this suit, hereby waive the right to prove any facts other than the following stipulated facts relative to the claim of Crane Co.:

I.

So many of the facts set forth in the amended petition of Crane Co. herein as are admitted in the answer of the Fidelity Trust Company or Elmer M. Hayden, receiver thereto, are hereby incorporated in this stipulation and made a part hereof.

II.

That Crane Co. at divers times between the 1st day of January, 1911, and the 31st day of May, 1913, inclusive, sold and delivered to the Washington-Oregon Corporation, a corporation, at its special instance and request, goods, wares, and merchandise; that said goods, wares and merchandise were sold upon orders or requisitions issued by said Washington-Oregon Corporation, and that the date upon which said goods, wares and merchandise were furnished and the reasonable value thereof is in accord-

ance with exhibit "A" annexed to the amended bill of intervention; that thereafter beginning with the 5th day of April, 1911, and ending with the 31st day of May, 1914, the said Washington-Oregon Corporation made certain payments and was given certain credits to apply on said account; said payments having been made on the dates and in the amounts as evidenced by exhibit "B" annexed to the amended bill of intervention; that on June 1st, 1914, a balance was struck [50] between Crane Co. and Washington-Oregon Corporation, and on said date there was found to be due from the said Washington-Oregon Corporation to Crane Co. the sum of \$13,225.25, and that to evidence said indebtedness, on said date the Washington-Oregon Corporation executed its promissory notes, six in number, payable to the order of Crane Co. at future dates, aggregating said amount; that one of said notes was thereafter on June 7th, 1914, paid; that the unpaid notes issued by the said Washington-Oregon Corporation as aforesaid, are in accordance with the copies hereto attached, marked exhibit "1" to "5," inclusive, and made a part hereof; that on June 24th, 1914, goods, wares and merchandise were sold to the Washington-Oregon Corporation amounting to the sum of \$26.80; that on July 15th, 1914, goods, wares and merchandise were sold to the Washington-Oregon Corporation in the amount of \$29.23, which said goods, wares and merchandise were used for the purposes indicated by exhibits "6" and "7" hereto attached.

III.

That a portion of the goods, wares and merchandise furnished by the Crane Co. as aforesaid, represented by the unpaid notes as aforesaid, consisted of materials which were furnished at Vancouver, Washington, on the dates indicated by the invoices hereto attached, marked exhibits "A-1" to "A-22," inclusive; and were used for the purposes as explained and indicated by exhibit "A."

IV.

That a portion of the materials furnished by Crane Co. as aforesaid, represented by the unpaid notes as aforesaid, were furnished to the Washington-Oregon Corporation at Hillsboro, Oregon, and consisted of the materials as represented and [51] indicated by the exhibits hereto attached, marked exhibits "B-1" to "B-18," inclusive, and were used for the purposes explained and indicated in exhibit "B" hereto attached.

V.

That a portion of the materials furnished by Crane Co. as aforesaid, represented by the unpaid notes as aforesaid, were furnished to the Washington-Oregon Corporation at Chehalis, Washington, and consisted of the materials as represented and indicated by the exhibits hereto annexed, marked exhibits "C-1" to "C-8," inclusive, and were used for the purposes explained and indicated in exhibit "C" hereto annexed.

VI.

That a portion of the merchandise furnished by Crane Co. as aforesaid, and represented by said un-

paid notes, were furnished to the Washington-Oregon Corporation at Centralia, Washington, and consisted of the materials as represented and indicated by the exhibits hereto annexed, marked exhibits "D-1" to "D-5," and were used for the purposes explained and indicated in exhibit "D" hereto annexed.

VII.

That a portion of the merchandise furnished by Crane Co. as aforesaid, and represented by said unpaid notes, were furnished to the Washington-Oregon Corporation at Kelso, Washington, and consisted of the materials as represented and indicated by the exhibits hereto annexed, marked exhibits "E-1" to "E-3," and were used for the purposes explained and indicated in exhibit "E" hereto annexed.

VIII.

That the reports of the temporary receiver herein, with the exhibits thereto attached, are to be deemed as in evidence [52] to the extent that such reports or exhibits purport to state the earnings of said receiver, from the date of the appointment of said receiver, and the expenditures and nature thereof, and the balance of cash on hand at the time of the filing of said reports; and that testimony may be introduced by Crane Co. as to facts in those regards occurring subsequent to the filing of said last report, also any party hereto may introduce evidence in explanation of said reports.

IX

That Crane Co. is prepared to offer testimony to

the effect that the materials furnished by the intervenor herein were furnished and credits extended to the said Washington-Oregon Corporation in the reliance on the part of Crane Co. that the same would be paid out of the current earnings of said corporation, and that the current income would be applied toward the payment of said materials and that to that end Crane Co. permitted said account to continue as a running account and to accept payments thereon from time to time as the Washington-Oregon Corporation declared its ability to make such payments, and that Crane Co. relief upon a continuance of the business of the Washington-Oregon Corporation. For the purposes of this suit said testimony is to be deemed to have been introduced in evidence, subject to the objections of the temporary receiver and the complainant that the substance of such testimony is incompetent and irrelevant.

X.

That any party may introduce testimony showing the property acquired by said receiver since the date of said receivership, the money expended in acquiring said property, and the [53] source thereof, and the fair cash value of said property.

XI.

The interest was paid on outstanding bonds covered by the mortgage sought to be foreclosed herein, for the two years immediately prior to said receivership as shown in exhibit "Y" hereto annexed. Exhibit "Y" also shows the taxes paid, gross earnings, expenses and net earnings.

for the period indicated in said exhibit, and also shows how and for what purpose said earnings were disbursed, but any party may introduce testimony in explanation of said exhibit.

XII

That Crane Co. is prepared to offer testimony to the effect that the materials furnished by the intervenor herein were furnished to the said Washington-Oregon Corporation in the reliance on the part of Crane Co. that the same were to be paid out of the current earnings of said corporation, and that the said current income would be applied toward the payment of said materials, and that for the purposes of this suit such testimony is to be deemed to have been introduced in evidence subject to the objection of the temporary receiver and the complainant that such testimony is incompetent and irrelevant.

XIII.

That the materials furnished by Crane Co. were incorporated in and became a part of the property covered by the complainant's mortgage.

XIV.

Any party hereto may introduce testimony as to any sales, releases, or alienations in eminent domain proceedings effecting the property mortgages. [54]

XV.

None of the parties to this stipulation admit the relevancy of any of the facts hereto stipulated.

Dated at Tacoma, Washington, November 8, 1915.

MAURICE W. SEITZ,

Attorneys for Crane Co.

RANDOLPH W. CHILDS,

MAURICE A. LANGHORNE,

FREDERIC D. METZGER,

Attorneys for Temporary Receiver.

RANDOLPH W. CHILDS,

MAURICE A. LANGHORNE,

FREDERIC D. METZGER,

Attorneys for Complainant.

(Hereto are attached a number of exhibits.)

(Filed Nov. 8, 1915.) [55]

**Stipulation [That Exhibit "Y" be Withdrawn from
Stipulation Re Facts, etc.].**

IT IS HEREBY STIPULATED, that exhibit "Y" be withdrawn from this stipulation as to the facts.

IT IS FURTHER STIPULATED that during the period within which Crane Company's claim accrued and thereafter, there were actual operating net earnings in excess of the interest of the Washington-Oregon Corporation due and paid by the Washington-Oregon Corporation during said period on the First and Consolidated Mortgage bonds covered by the present foreclosure suit and in excess of Crane Company's claim; and that if the intervenor Crane Company is held by the Court to be in the class of priority claimants and otherwise entitled to priority in enforcing its claim, the inter-

venor shall be decreed to be entitled to its claim.

November 8, 1915.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
FREDERIC D. METZGER,

Attorneys for Complainant and Receiver.

MAURICE W. SEITZ,

Attorneys for Intervenor Crane Company.

(Filed Nov. 8, 1915.) [56]

Memorandum Decision, Filed December 4, 1915.

RANDOLPH W. CHILDS, for Complainant, and

HAYDEN, LANGHORNE & METZGER,

Temporary Receiver.

ROBERT B. WALKINSHAW.

M. W. SEITZ, for Intervenor.

CUSHMAN, District Judge.

Intervenor seeks a preference over the bonds secured by the mortgage foreclosed herein. The preference asserted is for \$11,146.67 on account of merchandise furnished the mortgagor between May, 1911 and the appointment of the receiver herein July 31, 1914.

The mortgage foreclosed was given May 20, 1911, upon the property of the mortgagor, including its income. After default in one semi-annual payment of interest, foreclosure proceedings were begun July 31, 1914. The mortgagor operated certain water and gas plants and an electric railway in Washington and Oregon. The case has been sub-

mitted upon an agreed statement [57] of facts.

To entitle intervenor to the preference it prays, the material sold by it must have been sold upon the credit of the mortgagor's current income, and not upon its general credit. These materials must have been required for the ordinary repairs or operation of the mortgagor's plants, used in discharging its service to the public. There must have been either current income remaining in the hands of the receiver, or such income must be shown to have been diverted to the payment of interest due under the mortgage, or in the construction of extensions, or for some purpose to the advantage of the bondholders which would not be considered either repairs or expenses of operation. Further, the preference over the bondholders can only be allowed on account of materials so furnished within a reasonable time before the appointment of a receiver. The burden is upon the intervenor to bring itself within these requirements and, if as concerning any one of these, it has not done so, it will not be necessary to determine whether it has so done as to the others. No citation of authority is needed to support the foregoing.

Before passing to the determination of this question, is it not out of place to observe that there has been no clear segregation showing what, if any, materials furnished were for use in connection with the mortgagor's electric railway line. It is not altogether clear that a preference will be given over the bonds secured by the mortgage upon the prop-

erty of all public service corporations. No decision by the Supreme Court has been called to my attention granting such a preference, except in cases of railroads.

While the terms of credit and convenience of the public is much the same and in many other respects the analogy between a railroad and other public service corporations is close, yet in one important particular there is a difference: The danger to the [58] traveling public upon a railroad which is suffered to remain out of repair is different in character and higher in degree than that incurred by those served by a run-down light, water or gas property and a different measure of care is required of the carrier.

34 CYC., 356 & 357, Note 82.

That the safety of the public is one of the reasons for the rule allowing a preference is not only shown in *Fosdick v. Schall* (99 U. S., 255), but by the following from *Southern Railway v. Carnegie Steel Co.* (176 U. S. 277):

“ * * * that, within this rule, a debt not contracted upon the personal credit of the company but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt. * * *

“But there is enough in the record to show that the rails purchased from the Carnegie

Company were needed in order that the roads in question might be kept by the railroad company in that condition of safety which its duty to the public and to the mortgage bondholders required. In August, 1892, *immediately after the receivers took possession of the railroads constituting the Danville system*, they reported to the court that the financial difficulties of the Danville Company during the previous two years had ‘prevented the operating officers from being able to expend the proper amount *for new rails, and upon the roadbed and structures to keep the railroad in the condition in which it should be maintained*, * * * the foreclosure receivers represented to the court, by petition, that ‘for the *proper and economical operation of the lines of railroad of which they are receivers, and for the safety of passengers and property transported over such roads*, as required by the order of this court appointing such receivers, two thousand tons of new steel rails are *an absolute necessity*’; * * * Again * * * the court * * * made an order authorizing the receivers to purchase 2500 tons of new steel rails in order ‘*to properly operate the railroads*’ in their charge, ‘*and for the safety of persons and property transported*’ ” (at pp. 285, 287 & 288.)

(The italics are those of the Supreme Court.)

“Suppose the court had directed the receivers in the Clyde suit, before turning over the property to the receivers in the foreclosure suit, to

pay the claims of the Carnegie Company, is it possible that the mortgage creditors would have been heard to object to such an order? Certainly not, if it appeared, as it does satisfactorily appear in the present case, that the Carnegie debts were incurred in the ordinary course of business for the purpose of keeping the railroad in safe condition for use by the public.” (at p. 291.) [59]

All but an insignificant part of the material furnished, for which a preference is asked, was furnished more than a year prior to the appointment of a receiver.

The business of the mortgagor is small in comparison with that of corporations operating railways in general. The mortgage trustee, promptly after default, brought suit to foreclose, asking the appointment of a receiver.

“Why should a different rule be applied to the contracts made with the Carnegie Company *shortly before the appointments of receivers in the Clyde suit*, the original contract being for only 2500 tons, and the last one for 1656 tons?” (S. Ry. v. Carnegie Steel Co., 176 U. S., *supra*, at p. 289.)

This same expression is used a number of times throughout the decision, showing that it was not inadvertently done.

“If the parties to the contract contemplated that the notes given for the rails should be paid for out of the current earnings of the railroad,

and if the Carnegie Company lost no equity merely by renewing the notes, it follows, under the settled doctrine of this court that the mortgagees could not have objected to the payment of the renewal notes out of any net earnings in in the hands of receivers, although the contract for rails was a few months back of the six months immediately preceding their appointment."

The Court hastens to add:

"Each case, as already observed, must depend largely upon its special facts." (So. Ry. v. Carnegie S. Co., *supra*, at p. 292.)

In the Carnegie Steel case, the supplies held to be for current repairs were rails sold the Richmond & Danville Railroad Company. This company owned and controlled more than twenty other railroads of other corporations, with the total of over three thousand miles of tracks. The supplies so furnished were used in part by the Richmond and Danville Railroad. The remainder was used upon three or four other of its controlled roads. Other complications also appear in the statement of the case.

The Court continues:

"In some cases the courts, in their administration of [60] railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. *Such a rule will do full justice in . . . most cases to creditors who are entitled to look*

to current receipts for the payment of current debts. But no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, *under the circumstances of particular cases*, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. Touching this question of time and the principles upon which the equitable rights of creditors in such cases as this rest, Mr. Justice Brewer said, in *Blair v. St. Louis etc. Railway Co.*, 22 Fed. Rep., 471, 474: 'The idea which underlies them I take to be this: that the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employees cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable

time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. *Six months is the longest time I have noticed as yet given. Ordinarily, I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary.*' '' (at 292)

The italics are those of this Court.

The effect of the Court's reasoning is that the largeness of the concern, its extensive lines and complicated business, rendered a longer time than six months reasonable for the adjustment and settlement of its current account,—doubtless, taking into consideration that it would be necessary, in the ordinary course, for the Richmond and Danville Railroad to have a settlement with its controlled lines and receive from them the money for the rails used by each system before settling with claimant. Other reasons for the six months rule are stated in *Westinghouse Air Brake Co. v. Kansas City So. Ry.* (173 Fed., 26.)

Intervenor contends that the six months rule was not considered by the Court in *Moore v. Donahoo* (217 Fed., 177. In [61] this case the receiver was appointed December 6, 1903.

“The master found (and the correctness of the finding is not questioned) that the claims which accrued during the period of six months immediately preceding the appointment of the receiver—that is, from June 1, 1909, to Decem-

ber 6, 1909—on account of labor done and materials furnished in the ordinary course of business, and for the normal maintenance and operation of the railroad, and which it was reasonable to expect would be paid out of the current operating income, aggregated \$48,571.-

42. * * *

“The master held that all of the claims were preferential in character.” (at pp. 179 & 180)

The District Court confirmed the master’s report.

In answering appellant’s contention that the mortgagee was only bound, if at all, to restore income diverted after the preferred claims became due, and was not obliged to restore income appropriated to the mortgagee’s benefit prior to the maturity of the preferred claims, and in distinguishing the cases cited by appellant in its contention, the Court says:

“But here, as is the general rule, the courts must be understood as having spoken with reference to and in the light of the facts they had under consideration, and there is no very close analogy between some of the cases and the one at bar. In the first one cited, it may be pointed out that there was but a single intervention, and that the intervenor sought to take advantage of diversions antedating the preferential period. While, as a matter of strict logic, these distinctions may not be controlling, still it is apparent that the court had no reason to consider, and probably did not consider, the

practicability or propriety of applying the rule relied upon to a case like the present one, where the task of marshaling the numerous claims with reference to diversions, and calculating the distributive share to which each is entitled, would be extremely difficult if not impossible. In the Central Trust Company Case there were but three intervenors, and it is not clear that the diversion was within the preferential period. In each of the other cases there was but one intervention, and in at least one of them the diversion relied upon was prior to the six months period. * * * Whatever standard may be employed in the case of an isolated claim in relation to an isolated diversion, it is thought that, at least in cases where the claims are numerous and the accounts current, the rule contended for would not only be difficult of application, but inequitable as well, and that some period must be adopted as a unit, during which all claims are to be deemed to constitute a single group and have the same footing. We agree with the court below in adopting the preferential period as such unit, and in holding that presumptively the current revenues thereof are applicable to the current debts, and that in case of a diversion restoration may be decreed for the common benefit of the entire group.” (at p. 186) [62]

The Court, in the foregoing case, for the purpose of fixing a diversion period, adopted the preference period, treating the latter as a well recognized

period of six months. The "standard" the Court was striving to fix was one for the period during which diversion of current income would be required to be restored; but the court recognized, approved and so plainly adopted the six months preferential period as to leave this court no other course than to so hold.

The Court could not in that case adopt it for one purpose, without adopting it for the other, for, if the preferential period is not adopted, then the diversion period has nothing to rest upon. It is undoubtedly true that the two chief questions considered by the Court in *Moore v. Donahoo* (127 Fed., 177) were whether the Court would adopt the net income rule, or the going concern rule, concerning which the courts have been divided, and the further question as to whether there had been a diversion. But, in ruling upon the latter question and in fixing the time in which money expended for the benefit of the mortgagee would be considered a diversion, it fixed such time, in that case and in all cases, in the absence of unusual circumstances as the preferential period; to wit, six months.

While the question was not squarely before the Court, the continued recognition by the Supreme Court of the six months rule is shown by the following from the dissenting opinion in *Gregg v. Metropolitan Trust Company* (197 U. S. 183, at 196):

"But recognizing that there must be some limitation of time, the courts have fixed six

months as the period within which preferential claims may accrue.”

At the time of the decision in *New York Guar. & Indem. Co. v. Tacoma Ry. & M. Co.* (83 Fed., 365), the six months' rule was not as firmly established as at the present time, yet, even in that case the preferential period was not enlarged to the extent that would be necessary to include the intervenor's claim in [63] the present case. In that case a cable was sold to the mortgagor October 24, 1892. Suit was brought by claimant for its value October 5, 1893, less than a year after its claim accrued. True, a receiver was not appointed until December 24, 1894, but claimant did not recover judgment in his suit until 1896, and the Court refused to consider the time as running against claimant, after the starting of its suit for, by bringing suit, it was exercising all requisite diligence.

Westinghouse v. Kansas City, So. Ry. Co., 137 Fed., 26;

34 Cyc., 363, “D.”

In *Bellingham Bay Imp. Co. v. Fairhaven Ry. Co.* (17 Wash., 371, at 375) the Court says:

“ ‘There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver. There is no “six months' rule.” ’ ” (Quoting from *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed., 132.)

“Upon principal, it would seem but just that a party should, in the absence of special circumstances of controlling importance, be entitled

to equitable relief for the full period in which, according to the statute, an action might be maintained at law to enforce the demand. If the lapse of three years is necessary under the statute to bar the debt, there appears to be no sufficient reason, generally speaking, why the equitable right should be barred within a shorter period."

The Supreme Court in *Southern Ry. v. Carnegie Steel Company* (176 U. S., 257, at 292) said:

"In some cases the courts, in their administration of railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. Such a rule will do full justice in most cases to creditors who are entitled to look to current receipts for the payment of current debts. But no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period."

It, therefore, appears that the Supreme Court, whose decisions bind this Court, said that special circumstances are necessary to take a case out of the six months' rule, whereas [64] the Washington Supreme Court says that special circumstances are

necessary to take a case out of the general Statute of Limitations.

Counsel for intervenor urges as special circumstances justifying the enlarging of the preferential period beyond six months: That the material furnished by intervenor was the means of saving to the mortgagor certain of its franchises. While the mortgagor was required by the municipal authorities to make the repairs and construction into which the material furnished by intervenor entered, yet it is not clearly established that, but for that work, the franchises would have been forfeited or new franchises would not have been granted.

Further, viewed in one way, the greater part of that which is done by a public service corporation—its ordinary operation—is necessary to preserve its franchise, yet it affords no particular reason to relax the rule of diligence required on the part of materialmen.

Counsel further contends that the preferential period should be enlarged because of the diversion of current income to the payment of interest on the bonds. While such division has been considered sufficient to warrant the payment of materialmen out of the proceeds derived from the payment of the *corpus* of the property, no case has been called to my attention where it has been held sufficient to warrant an enlargement of the preferential period.

If the current income had been lost or wasted, or had been paid to other materialmen or workmen for other repairs, the effect upon intervenor would

gage bondholders of Washington-Oregon Corporation to the extent of \$56.03, and that the whole of the remainder of said claim be denied such preference, and it is by the Court [67]

FURTHER ORDERED, ADJUDGED AND DECREED that the temporary receiver pay said sum of \$56.03 from funds now in his hands together with all costs incurred by the intervenor in this action.

Done in open court this 10th day of February, 1916.

EDWARD E. CUSHMAN,
Judge.

(Filed Feb. 10, 1916.) [68]

Petition for Appeal.

To the Honorable EDWARD E. CUSHMAN, Judge
of Said Court:

The above-named intervenor, Crane Co., feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 10th day of February, 1916, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignments of Error filed herewith, and prays that this appeal be allowed and that citation be issued as provided by law, and that a Transcript of the Record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said Court in such cases made and provided.

And your petitioner further prays that a proper order relating to the Bond on Appeal be made herein.

MAURICE W. SEITZ,

Solicitor for Intervenor, Crane Co.

(Filed Feb. 28, 1916.) [69]

Order (Allowing Appeal).

Upon motion of Maurice W. Seitz, solicitor and counsel for Crane Co., Intervenor, herein,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified Transcript of the Record, exhibits, stipulations and proceedings be forthwith transmitted to said United States, Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the Bond on Appeal be and it is hereby fixed at Five Hundred Dollars.

Dated this 28 day of Feb., A. D. 1916.

JEREMIAH NETERER,

Judge of the U. S. District Court for the Western District, Southern Division.

(Filed Feb. 28, 1916.) [70]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Crane Co., as Principal and United States Fidelity and Guaranty Company, as Surety, are

held and firmly bound unto the complainant above-named in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States to be paid to them and their respective executors, administrators, successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 2d day of March, A. D. 1916.

WHEREAS, a decree was rendered on the 10th day of February, 1916, in the above-entitled cause against the intervenor, Crane Co., and in favor of the complainant and receiver herein disallowing the prayer of the petition of the said Crane Co. and [71]

WHEREAS, said intervenor, Crane Co., is prosecuting an appeal in the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and decree of said United States District Court for the Western District of Washington, Southern Division.

NOW, THEREFORE, if the above-named Crane Co., shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain

in full force and effect.

CRANE CO.

By E. H. HOBBS,

Cashier,

Principal.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY. [Seal]

By DOUGLAS R. TATE,

Its Attorney in Fact,

Surety.

Approved 3-7-16.

JEREMIAH NETERER,

Judge.

(Filed Mar. 4, 1916.) [72]

Assignments of Error.

Comes now Crane Co., intervenor herein and files the following Assignments of Error, upon which it will rely in its prosecution of its appeal in the above-entitled cause from the decree made by this Honorable Court on the 10th day of February, A. D. 1916:

I.

That the Court erred in making the following Finding in said decree: "That there is no equity in the claim of the intervenor for preferential payment over the claims of the mortgage bondholders, except to the extent of Fifty-six (\$56.03) and 3/100 Dollars, and that with the exception aforesaid the claim of the intervenor is inferior to the claims of the mortgage bondholders, and only entitled to payment subsequent thereto." [73]

II.

That the Court erred in adjudging and decreeing that the intervenor, Crane Co., be allowed preferential payment over the claims of the mortgage bondholders only to the extent of Fifty-six and 3/100 (\$56.03) Dollars.

III.

That the Court erred in denying the intervenor, Crane Co., preferential payment over the claims of the mortgage bondholders except to the extent of Fifty-six and 3/100 (\$56.63) Dollars.

IV.

That the Court erred in failing and refusing to hold that the intervenor, Crane Co., was and is entitled to preferential payment over the claims of the mortgage bondholders to the extent prayed for in its amended petition of intervention.

V.

That the Court erred in refusing to hold and decree that the intervenor, Crane Co., was and is entitled to preferential payment over the claims of the mortgage bondholders to the extent of the amount prayed for in its amended petition of intervention, to wit, Eleven Thousand One Hundred Forty-six and 67/100 (\$11,146.67) Dollars.

VI.

That the Court erred in refusing to hold and decree the intervenor herein entitled to the relief prayed for in its amended petition of intervention.

MAURICE W. SEITZ,

Solicitor for Intervenor, Crane Co.

Stipulation (as to Original Exhibits, etc.).

IT IS HEREBY STIPULATED by and between the parties to the above-entitled cause that the original exhibits (inclusive of the exhibits attached to the stipulations) shall be transmitted with the records in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit and that the original exhibits need not be printed.

IT IS FURTHER STIPULATED AND AGREED in addition to the receiver's reports attached to the original stipulation as exhibits, that at the close of the said receivership, and at the time of the hearing of the above case in the United States District Court for the Western District of Washington, Southern Division, the receiver had in his possession the sum of \$23,091.44, representing net earnings from said receivership. No interest was paid during the receivership upon the so-called first and consolidated mortgage, amounting to \$1,569,000, or the second mortgage, amounting to \$400,000.

RANDOLPH W. CHILDS,
HAYDEN LANGHORNE & METZGER,
MAURICE W. SEITZ,

Attorney for Intervenor, Crane Co.

(Filed Mar. 11, 1916.) [75]

[Certificate of Clerk, U. S. District Court to
Transcript of Record.]

CLERK'S CERTIFICATE.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing and attached to be a full, true and correct transcript of the papers and proceedings in the case of Fidelity Trust Company, Trustee, vs. Washington-Oregon Corporation, et al., Crane Co., Intervenor, No. 15-E. lately pending in this Court, pursuant to the stipulation of counsel filed herein, as the originals thereof appear on file in this Court at Tacoma, in the District aforesaid.

I further certify that I have attached hereto the original Citation issued in the said cause, and that pursuant to stipulation herein filed, I am transmitting under separate cover and certificate the original exhibits introduced in said matter.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for
making, record, certificate and
return, 182 folios @ 15¢ ea. \$27.30

Clerk's certificate to transcript, 2	
folios and seal .....	.50
Clerk's certificate to exhibits, 2	
folios and seal.....	.50

[76]

ATTEST MY OFFICIAL SIGNATURE AND
THE SEAL OF THIS COURT this 25th day of
March, A. D., 1916.

[Seal]

FRANK L. CROSBY,
Clerk.

By E. W. Ellington,
Deputy Clerk. [77]

*In the United States Circuit Court of Appeals for
the Ninth Judicial Circuit.*

CRANE CO., a Corporation,

Appellant,

vs.

FIDELITY TRUST COMPANY, Trustee, a Cor-
poration, and WASHINGTON-OREGON
CORPORATION, INDEPENDENT ELEC-
TRIC COMPANY, a Corporation, and
WILLIS D. HOAG,

Appellees.

Citation [on Appeal].

The United States of America,
Western District of Washington,—ss.

To Fidelity Trust Company, Trustee, Washington-
Oregon Corporation, Independent Electric Com-
pany, a Corporation, and Willis D. Hoag, Ap-
pellees, Greeting:

You are hereby cited and admonished to be and

appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, on the 25th day of April, 1916, next, pursuant to an appeal allowed and filed in the clerk's office of the United States District Court for the Western District of Washington, Southern Division, wherein Crane Co., a corporation, is appellant, and you are the appellees, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 25th day of March, A. D. 1916, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal] JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

Service of the within Citation by receipt of copy thereof acknowledged this 25th day of March, A. D. 1916.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
F. D. METZGER,

Solicitors for Appellees.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit. Crane Co., a Corporation, Appellant, vs. Fidel-

ity Trust Company, Trustee, etc. et al., Appellees.
Citation.

[Endorsed]: No. 2768. United States Circuit Court of Appeals for the Ninth Circuit. Crane Company, a Corporation, Appellant, vs. Fidelity Trust Company, Trustee, a Corporation, and Washington-Oregon Corporation, Independent Electric Company, a Corporation, and Willis D. Hoag Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

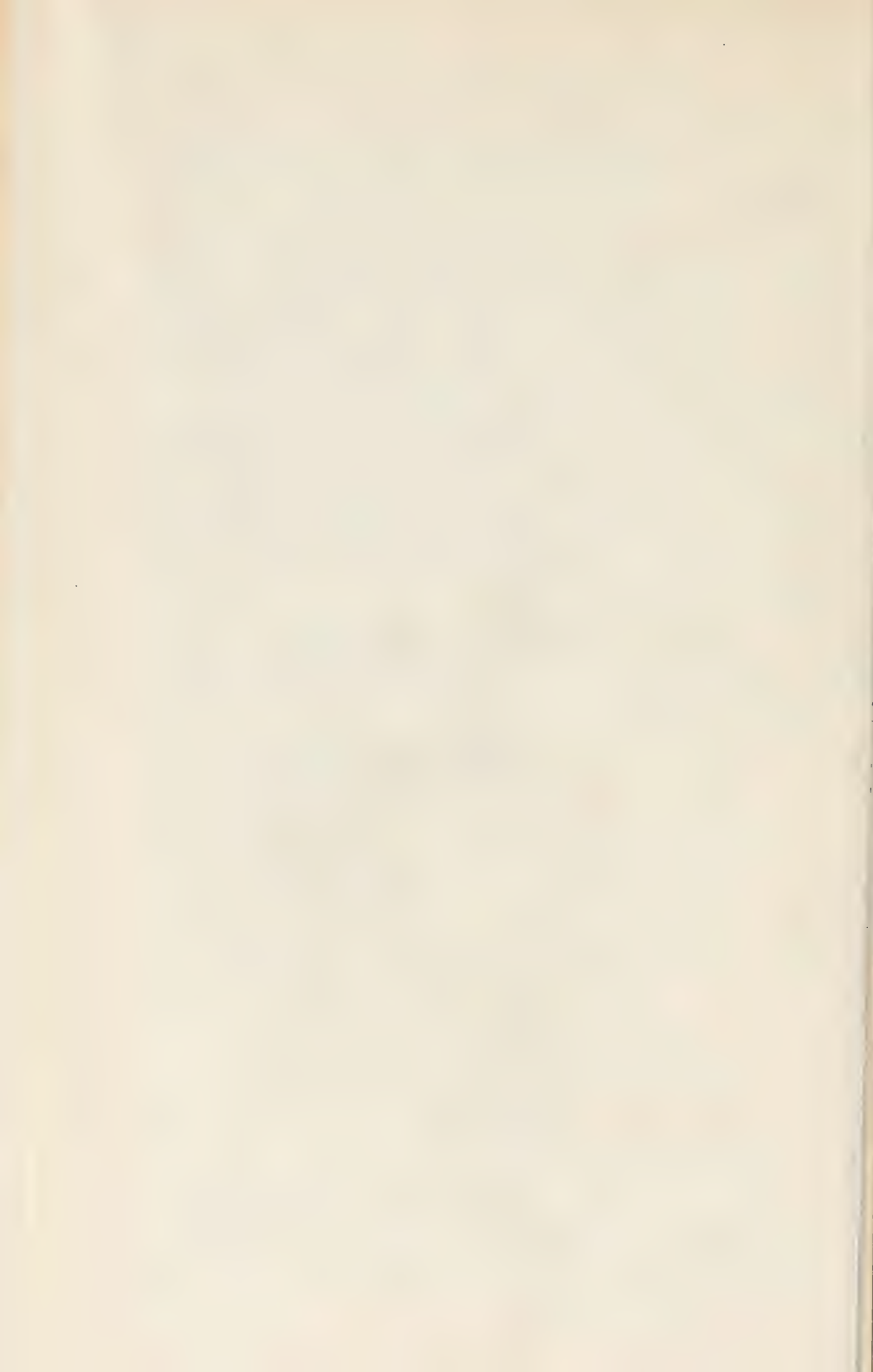
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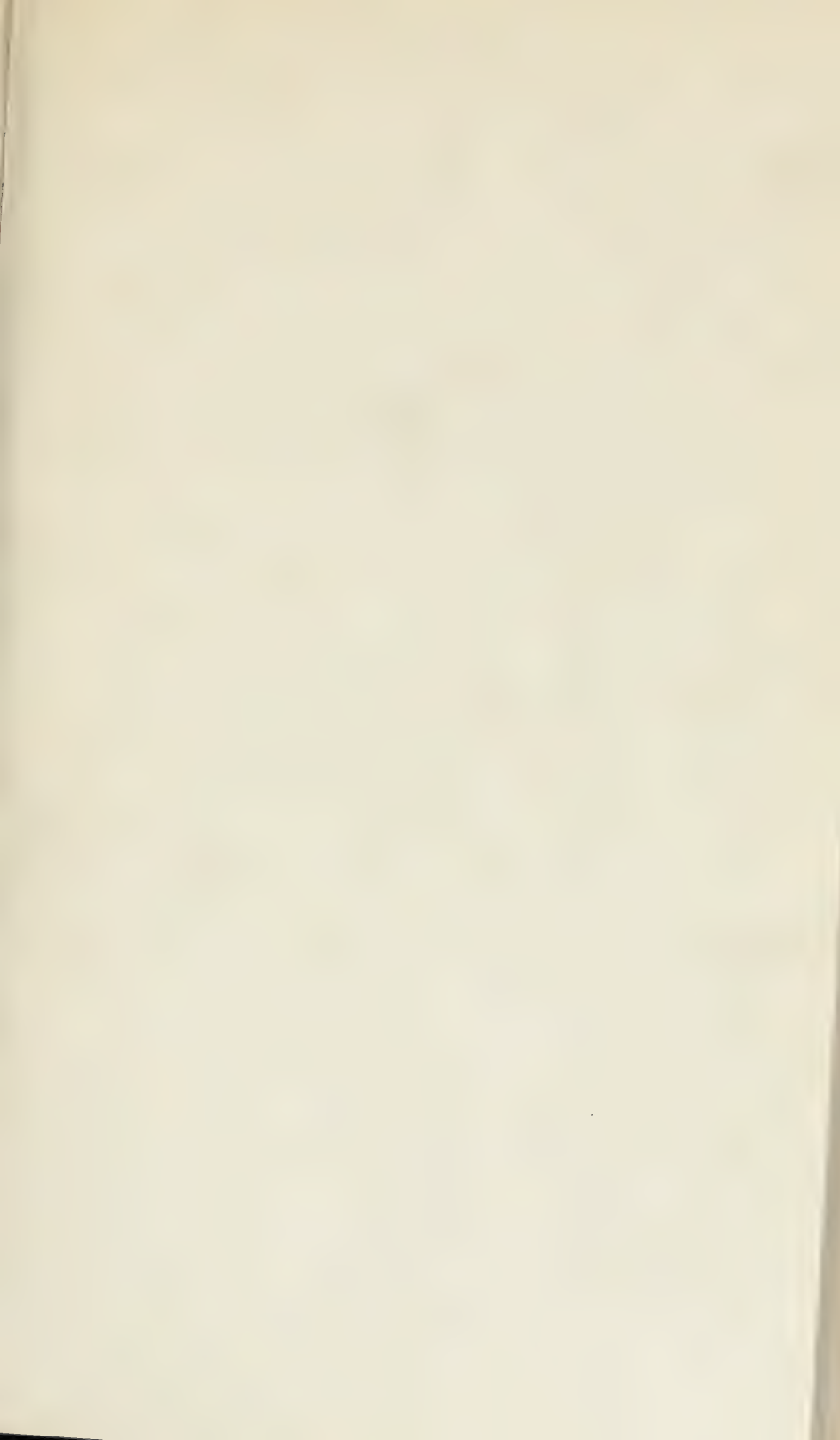
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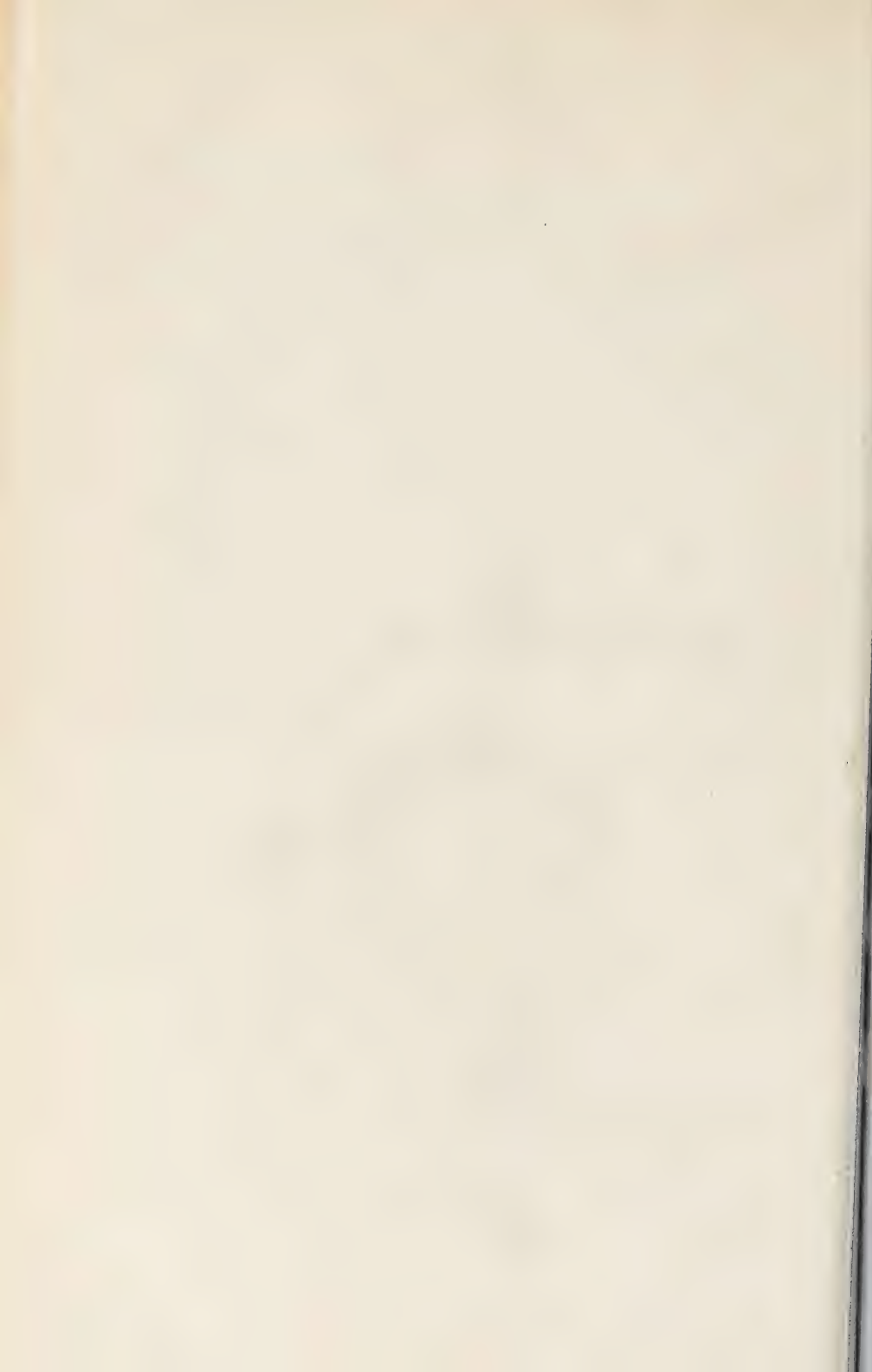
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.







United States

✓

Circuit Court of Appeals

For the Ninth Circuit.

CRANE COMPANY, a Corporation,
Appellant,
vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

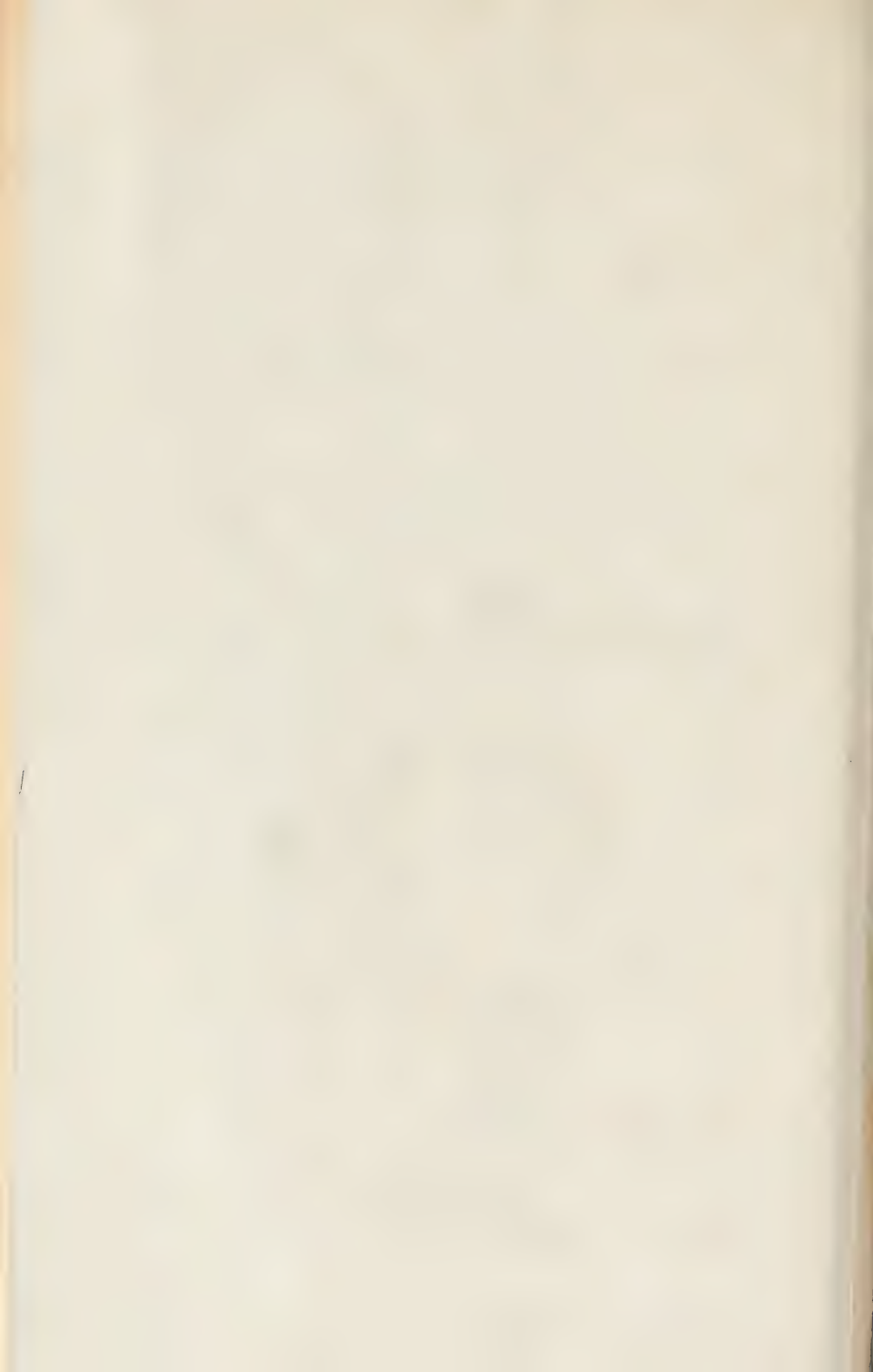
Supplemental Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

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U. S. DISTRICT COURT



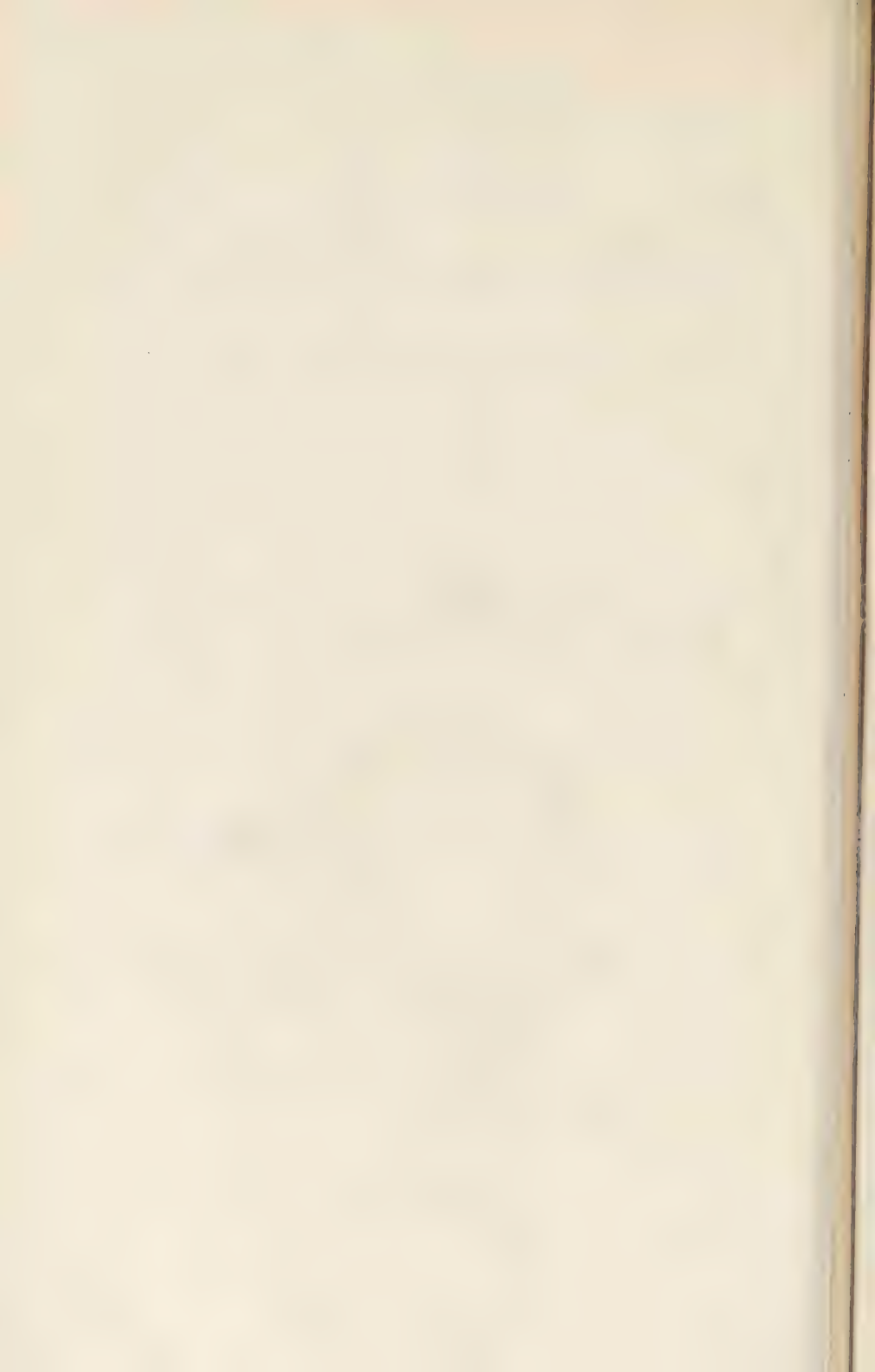
United States
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CRANE COMPANY, a Corporation,
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vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.



INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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EXHIBITS:

Exhibit "D"—Released Property in Counties of Cowlitz and Lewis, State of Washington	1
Exhibit "E"—Property Acquired by City of Centralia.....	9

Exhibit "D."

RELEASED PROPERTY IN COUNTY OF COWLITZ, STATE OF WASHINGTON.

That certain tract of land situated in said county of Cowlitz described as follows: Beginning at a point 27.13 chains west and 10 chains south of the northeast corner of section 26, township 8 north of range 2 West of Willamette Meridian on the west side of that county road known as the Silver Lake Road running thence in a northeasterly direction with the angling line of said road a distance of 209.4 feet; thence west a distance of 209.4 feet; thence in a southwesterly direction and paralleling the angling lines of said county road a distance of 209.4 feet; thence east a distance of 209.4 feet to the place of beginning, said tract of land being situated in said section 26; also that certain reservoir situated on the tract of land above described.

That certain tract of land described as follows: Beginning at a point 60.6 feet west of the intersection of the north line of the Peter W. Crawford donation land claim in Township 8 North of Range 2 West of the Willamette Meridian with the west line of the right of way of the Northern Pacific Railway and running thence south 15° east 30 feet to a point which is the initial point of the land now being described; thence from said initial point south 15° east 150 feet; thence west 40 feet; thence north 15° west 150 feet; thence east 40 feet to the initial point, together with any and all buildings, machinery or

pumping plant on September 25, 1913, situated thereon, or connected therewith, or a part thereof.

Any and all mains, pipe-lines of every character, nature and description which were on September 25, 1913, owned or in the use, possession and enjoyment of said Washington-Oregon Corporation within the corporate limits of the city or town of Kelso for the purpose of conveying or distributing water, including any and all pumping stations, pumps, machinery, connections, supplies and material used in connection therewith, for what was then known as the water system of said Washington-Oregon Corporation for the said city or town of Kelso.

It being the purpose and intent of the three preceding paragraphs hereof to describe any and all of the lands and any and all of the pumping stations, machinery, pipes, pipe-lines and the entire water distributing system of said Washington-Oregon Corporation existing on September 25, 1913, for the said city or town of Kelso, or then used in connection therewith, or then belonging thereto, or then a part thereof.

Any and all of those certain rights and privileges which were reserved to the said Washington-Oregon Corporation for a period of thirty-five years from the 23d day of October, 1911, in that certain warranty deed executed by said Washington-Oregon Corporation to John L. Harris, F. L. Stewart, H. E. McKenney, J. H. Swager, J. S. Robb, C. A. Taylor and J. M. Ayres, recorded in Volume 54 of Deeds of said Cowlitz County at page 135, in and by which said Washington-Oregon Corporation reserved the

right to lay, repair, replace and maintain and operate a pipe-line and pipe-lines, intake and intakes, steam and electric pumps and filters for the transmission of water for any purpose on, over and across that portion of the tract of land conveyed by said deed which was then in use for said purpose, together with the right to house said lines, intakes, pumps, and filters, also the right of ingress and egress for the purpose of maintenance and repair, and any and all reservations in such deed contained.

All those rights, privileges and franchises granted by and described in that certain ordinance of the City of Kelso, officially known as Ordinance Number 122, and entitled "An Ordinance granting to Washington-Oregon Corporation its successors and assigns, the right, privilege and franchise of supplying with water the City of Kelso and the people therein, and permission to lay, maintain and use water mains, pipes and appurtenant, fixtures, in, under, through and across the public streets and ways of the City of Kelso; fixing restrictions thereon, prescribing the duties and power of the grantee; fixing the term and terms and conditions thereof; providing for forfeiture and prescribing the method of declaring and exercising the same." Passed by the council of said city on April 7, 1911, and approved by the mayor thereof.

Also all rights of way or easements possessed by Washington-Oregon Corporation on September 25, 1913, for the main pipe-line or any pipe-line or lines, or any distributing lines therefrom.

A tract of land beginning at a point fifteen feet south of the northwest corner of the Peter W. Crawford donation land claim, so called, in township eight north, range two west of the Willamette Meridian, running thence east parallel to and fifteen feet south of the north boundary of said donation land claim a distance of two hundred nine feet to the westerly boundary of the right of way of Northern Pacific Railway Company; thence along said westerly boundary of said right of way in a southerly direction to the intersection of the line now being described with what would be the center line of Cowlitz Avenue in the City of Kelso in said County of Cowlitz if said center line were projected or extended thence north seventy-six degrees west a distance of 94 feet; to the meander line of the Cowlitz River; thence along said meander line north 6° east a distance of 338 feet; thence north 24° east a distance of 442 feet; thence north a distance of 594 feet; thence north 7° west 300 feet to the place of beginning and containing 2.33 acres, more or less.

All buildings situated on the tract of land described in the next preceding paragraph hereof together with all property therein contained owned by Washington-Oregon Corporation on October 23, 1911, excepting, however, a building constructed of galvanized iron erected by Washington-Oregon Corporation, and then used for the purpose of housing a filter and machinery therein installed by Washington-Oregon Corporation and excepting also the entire contents of said building.

The two preceding paragraphs being subject to the reservations, exceptions, conditions and covenants set forth in a certain deed from Washington-Oregon Corporation to John L. Harris, F. L. Stewart, H. E. McKenney, J. H. Swager, J. S. Robb, C. A. Taylor and J. M. Ayres, dated October 23, 1911, and recorded in the Record of Conveyances of said County of Cowlitz in Volume 54 of Deeds, at page 135.

RELEASED PROPERTY IN COUNTY OF
LEWIS, STATE OF WASHINGTON.

All that property which was conveyed by Lewis County Water Company to Twin City Light and Traction Company, by deed dated May 2, 1911, and recorded in Book 112 of Deeds at page 123 of the Records of Lewis County, Washington, and thereafter conveyed by Twin City Light and Traction Company by deed dated May 5th, 1911, and recorded in Book 110 of Deeds at page 574, of the Records of Lewis County, Washington, including the following described property:

Lot 1, in Block 23 of Chehalis Land and Timber Company's Second Addition to Chehalis, as shown by the plat thereof and recorded in the office of the County Auditor of said County of Lewis:

Lot 6 in Block 24 of Chehalis Land and Timber Company's Second Addition to Chehalis, as shown by the recorded plat thereof in the office of the County Auditor of said County of Lewis:

The east fractional part of Lot 7 in Block 24 of Chehalis Land and Timber Company's Second Addi-

tion to Chehalis, as shown by the recorded plat thereof in the office of the County Auditor of said County of Lewis, which part of particularly described as follows, to wit: Beginning at a point where the northeast line of Lot 5 in Block 24 of said addition intersects the southeast line of said lot 7, running thence northeast across said lot 7, continuing on a line with the east line of said lot 5, to the northeast line of said Lot 7; running thence easterly on the northeast line of said Lot 7 to the east line of said Lot 7, running thence southerly to the place of beginning.

Lot 3 in Block 17 of Chehalis Land and Timber Company's Second Addition to Chehalis, according to the recorded plat thereof in the office of the County Auditor of said County of Lewis.

Lot 4 in Block 17 of Chehalis Land and Timber Company's Second Addition to Chehalis, according to the recorded plat thereof in the office of the County Auditor of said County of Lewis.

Lot 1 in Block 20 of Chehalis Land and Timber Company's Second Addition to Chehalis, according to the recorded plat thereof in the office of the County Auditor of said County of Lewis.

Lot 5 of Block 25, of Chehalis Land and Timber Company's Second Addition to Chehalis, according to the recorded plat thereof in the office of the County Auditor of said County of Lewis.

That portion of Lot 7 in Block 24 of Chehalis Land and Timber Company's Second Addition to Chehalis, according to the recorded plat thereof in the office of the County Auditor of said County of

Lewis, which part is particularly described as follows, to wit:

Commencing at the northeast corner of Lot 5 in said Block 24 where the same intersects the south line of said Lot 7 running thence westerly on the south line of lot 7 a distance of 50 feet, running thence northerly along a line which would be a prolongation of a line between lots 4 and 5 in said block 24, a distance of 100 feet, to the north line of said lot 7; running thence easterly on the north line of said lot 7 a distance of 50 feet, running thence southerly a distance of 100 feet to the point of beginning;

A part of Lot 8 in Block 24 of Chehalis Land and Timber Company's Second Addition to Chehalis, according to the recorded plat thereof in the office of the County Auditor of said County of Lewis, which part is particularly described as follows, to wit: Beginning at a point on the northeast line of Chehalis Land and Timber Company's Second Addition to Chehalis where that line intersects the south line of said lot 8, running thence northwesterly along said boundary line of said addition a distance of 123.6 feet, running thence at right angles with said boundary line a distance of 122.3 feet to a point on the south boundary line of said lot 8, where said boundary line is intersected by a prolongation northerly of the west line of lot 5, in said block 24, running thence easterly along said lot 8 to the point of beginning, containing seventeen hundredths of an acre, more or less;

That part of the northeast quarter of the southwest quarter of section 5 in township 13 north of

range 2 west of Willamette Meridian, which part is particularly described as follows, to wit: Beginning at a point on the quarter section line running north and south in section 5, in township 13 north of range 2 west of the Willamette Meridian, which point is 570 feet south of the center of said section 5, running thence north on said quarter section line a distance of 570 feet to the center of said section 5, running thence west along the quarter section line which runs east and west, a distance of 520 feet, running thence south a distance of 526 feet to the center of the Newaukum River, running thence following along the center of said river upstream to a point 81.2 feet west of the place of beginning, running thence east a distance of 81.2 feet to the place of beginning containing 5 acres, more or less.

Certain rights of way for the maintenance of a water pipe-line more fully described in the following deeds: A certain deed from S. A. Phillips and wife to Chehalis Water Company, dated May 10, 1893, and recorded in the records of the County Auditor of said County of Lewis in Book 39, of deeds, at page 262; a certain deed from J. B. Rice and wife to Chehalis Water Company, dated May 10, 1893, and recorded in the records of the County Auditor of said County of Lewis in Book 39 of Deeds, at page 258; a certain deed from the State of Washington, by the Trustees of the Washington State Reform School, dated May 10, 1893, and recorded in the records of the County Auditor of said County of Lewis in Book 39 of Deeds, at page 259; a certain contract between E. A. Frost and Chehalis Water Company,

dated March 17, 1905, and recorded in the records of the County Auditor of said County of Lewis in Book 80 of Deeds, at page 129.

Exhibit "E."

**PROPERTY ACQUIRED BY CITY OF
CENTRALIA.**

FIRST: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, in block forty-one in second Railroad Addition to the City of Centralia.

SECOND: Lots 1, 2, 3, and 4 in Block 42 of said second Railroad Addition to the City of Centralia.

THIRD: (a) Block 4 in Pleasant View Addition to the City of Centralia; (b) Block 5 in Pleasant View Addition to the City of Centralia; (c) A tract of land sometimes known as Tax lot number 18, containing $1\frac{1}{4}$ acres more or less, and particularly described as follows: Beginning at a point four hundred feet east of the southwest corner of the southeast quarter of the northwest quarter of Section 9, in Township 14 north, range 2 West of the Willamette Meridian; running thence east 150 feet; thence north 375 feet; thence west 150 feet; thence south 375 feet to the place of beginning.

(d) A tract of land formerly a portion of Locust Street, so called in said Pleasant View Addition to the City of Centralia bounded on the north by the south line of the tract of land described in the last foregoing subdivision (b) hereof, on the east by the west line of the tract of land described in the last foregoing subdivision (c) hereof, on the south by the north line of the tract of land described in the last foregoing subdivision (2) hereof, and on the

west by a line formed by connecting the southwest corner of the tract of land described in said subdivision (b) with the northwest corner of the tract of land described in said subdivision (a).

FOURTH: Twelve and one-half miles more or less, of pipes, mains, service pipes and connections, constituting a system for the distribution and transmission of water located within the corporate limits of said City of Centralia as the same were on June 3, 1913, established whether in public ways or elsewhere, together with such rights as Washington-Oregon Corporation then had to repair, replace, maintain and operate said pipes, mains service pipes and connections upon or in the ground where they then were.

FIFTH: The following structures and buildings situated, owned or used by Washington-Oregon Corporation on the tract of land described in paragraph second hereof.

(a) A wooden building used for and known as a power-house together with the mechanical water filter boiler, two steam pumps and all other property therein contained.

(b) Two certain open wells of water.

(c) Ten certain driven wells of water, more or less.

SIXTH: Twenty so-called driven wells of water more or less located on the tract of land described in paragraph first hereof.

SEVENTH: The following structures then situated, owned or used by the Washington-Oregon

Corporation on the lands described in paragraph third hereof, that is to say:

(a) A certain cylindrical reservoir for the storage of water constructed of brick and lined with concrete, of the diameter of about 55 feet situated in part on the tract of land described in subdivision (b) of paragraph third hereof in part on the tract of land described in subdivision (c) of said paragraph third and in part on the tract of land described in subdivision (d) of said paragraph third.

(b) A certain other cylindrical reservoir for the storage of water constructed of reinforced concrete of the diameter of about 73 feet, situated in part on the tract of land described in subdivision (a) of paragraph third hereof, in part on the tract of land described in subdivision (c) of said paragraph third and in part on the tract of land described in subdivision (d) of said paragraph third.

EIGHTH: The right to divert, appropriate and use for any purpose all water on any one or all of the tracts of land described in paragraphs first, second and third hereof.

NINTH: Such right as Washington-Oregon Corporation had on June 3, 1913, to divert, appropriate and use for any purpose all or any part of the waters of the Skookumchuck River in said County of Lewis.

TENTH: All other lands, rights of way, roads, water rights, and water locations and appropriations, water ditches, flumes, reservoirs, pipe-lines, water-mains, service pipes, conduits and all other rights, and the means for appropriating, conveying,

storing or distributing water, any and all pumping stations and any and all other structures, buildings, and erections, all machinery, engines, boilers, cables, pipes, joints, connections, taps, valves, tools, implements and appliances of every description and any and all rights, privileges, franchises and immunities of every kind and description owned or used on June 3, 1913, by Washington-Oregon Corporation in connection with or in the operation of what is known as its water system in and of the City of Centralia in and of the County of Lewis, State of Washington.

It being the purpose and intent to describe the entire water system and plant of Washington-Oregon Corporation in and of the City of Centralia as the same was on June 3d, 1913, operated and in use and as the same was purchased by Washington-Oregon Corporation from Centralia Water Supply Company, a corporation, and conveyed by deed dated June 1, 1911, and recorded August 23, 1911, in Volume 114 of Deeds in the office of the Auditor of Lewis County, Washington, at pages 93 et seq. thereof, together with any and all betterments, extensions and improvements thereafter made on or to such system up to June 3, 1913.

All of those rights, privileges, and franchises granted by and described in that certain ordinance of the City of Centralia officially known as Ordinance No. 136, entitled "An Ordinance Granting to the Centralia Water Supply Company, its successors and assigns," etc., passed by the Council of said city on September 11, 1906, approved by the Mayor thereof on the same day and recorded in Book

3 of Ordinances at page 1.

Subject, however, to the *covenatso* conditions, reservations and exceptions set forth in a certain deed from Washington-Oregon Corporation to the City of Centralia dated June 3, 1913, and recorded in the Records of Conveyances of said County of Lewis on Block 123 of Deeds at page 104.

In the District Court of the United States for the Western District of Washington.

IN EQUITY.—No. 15—E.

FIDELITY TRUST COMPANY, Trustee, Complainant,

vs.

WASHINGTON-OREGON CORPORATION,
INDEPENDENT ELECTRIC COMPANY
and WILLIS D. HOAG, Defendants.

BILL OF COMPLAINT.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Sitting in Equity:

Fidelity Trust Company, Trustee under the mortgage hereinafter referred to, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, brings this, its Bill of Complaint, against Washington-Oregon Corporation, a corporation organized and existing under and by virtue of the laws of the State of Washington, and thereupon your orator complains and says:—

First.—That on and prior to the first day of April, 1911, the defendant, Washington-Oregon Corpora-

tion, was and still is a corporation duly organized and existing under the laws of the State of Washington, and a resident and citizen of the State of Washington, and an inhabitant of the Western District of Washington, within the meaning of the laws determining the jurisdiction of this Honorable Court, and that Washington-Oregon Corporation then was and still is authorized to construct, own, maintain and operate the property and premises hereinafter mentioned, and to make, execute and deliver the mortgage herein sought to be foreclosed, and to make, deliver and issue the bonds therein referred to.

Second.—That your orator, Fidelity Trust Company, at all times hereinafter mentioned was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and that it is a resident and citizen of the State of Pennsylvania, and an inhabitant of the Eastern District thereof within the meaning of the laws determining the jurisdiction of this Honorable Court, and that at all times hereinafter mentioned, it was, and now is, duly authorized and empowered under the terms of its charter, to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trust upon it imposed under and by virtue of the mortgage or deed of trust hereinafter described.

Third.—That Independent Electric Company at all times hereinafter mentioned was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington,

and at all such times was, and still is, a resident and citizen of the State of Washington.

Fourth.—That Willis D. Hoag at all times hereinafter mentioned was, and still is, a resident and citizen of the State of Washington.

Fifth.—That heretofore and prior to the nineteenth day of May, 1911, the defendant, Washington-Oregon Corporation, in the exercise of its powers under the laws of the State of Washington and Oregon, and in accordance with resolutions duly passed by its board of trustees and by its stockholders at respective meetings thereof duly called and held, which said resolutions of its stockholders were duly concurred in by the vote in person or by proxy of holders of more than two-thirds of the par value of the issued capital stock of Washington-Oregon Corporation, duly authorized the execution and delivery by the proper officers of Washington-Oregon Corporation of negotiable bonds in the amount of \$5,000,000 par value, dated the first day of April, 1911, and payable at the office of your orator, as trustee, in the city of Philadelphia, State of Pennsylvania, on the first day of April, 1936, in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, or at the option of the Company on any semi-annual interest day before maturity by payment of the principal sum due thereon, with five per centum thereof additional and accrued interest; said bonds to bear interest at the rate of six per centum per annum, payable in like gold coin or its equivalent semi-annually on the first days of April and October of each year at

the office of your orator, and without deduction from either principal or interest of any tax which might by any future or then existing laws of the United States, or of the State of Washington, be imposed thereon; said bonds to be for such denomination or par value, and in such form consistent with the terms of the mortgage or deed of trust hereinafter referred to, as at the time of the issue thereof the board of trustees of the Washington-Oregon Corporation should prescribe; the \$1,500,000 of said bonds which, as therein provided, should be issued forthwith, to be coupon bonds of the denomination of \$1000 numbered consecutively from one upwards, and coupon bonds of the denomination of \$500 numbered from A-1 upwards; said bonds aggregating \$1,500,000 to be certified by your orator, as trustee, and by it delivered to or upon the order in writing of the president, vice-president or treasurer of Washington-Oregon Corporation, or such other persons as the board of trustees might direct, upon the execution, delivery and recording of the mortgage or deed of trust hereinafter referred to; the balance of said bonds, aggregating \$3,500,00 par value, to be retained by Washington-Oregon Corporation and when, and from time to time, and in such amounts as should be required for the purpose of redeeming the outstanding bonded indebtedness on the property of Washington-Oregon Corporation and in order to provide for construction, equipment, betterments, improvements and additions to the plant and property of the Washington-Oregon Corporation then owned or thereafter to be acquired, when

made and to be made, and for the acquisition of any property real or personal, or franchises, which Washington-Oregon Corporation was legally authorized and empowered to own, lease and operate for any of said purposes, and for other corporate purposes, the said \$3,500,000 par value of bonds were to be delivered to your orator and by your orator certified and delivered to Washington-Oregon Corporation, upon resolution of the board of trustees of said Washington-Oregon Corporation, subject to the limitations in said mortgage contained.

Sixth.—That on or about the nineteenth day of May, 1911, being thereunto duly authorized by the laws of the State of Washington and Oregon, and by resolutions duly passed by the board of trustees and by the stockholders of Washington-Oregon Corporation at respective meetings thereof duly called and held, which said resolutions of its stockholders were duly concurred in by the vote in person or by proxy of holders of more than two-thirds of the par value of the issued capital stock of Washington-Oregon Corporation, the defendant, Washington-Oregon Corporation, duly made, executed and delivered to your orator as trustee, its said mortgage or deed of trust dated the first day of April, 1914, wherein and whereby, in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, it granted, bargained, sold, released, conveyed, assigned, transferred, and set over unto your orator as trustee, its successors and assigns forever, all the property de-

scribed in the paragraphs of said mortgage numbered "First" to "One hundred and twenty-fourth" inclusive, together with all its property, real or personal, rights, privileges and franchises of every kind and nature whatsoever and the rents, issues and profits thereof, then owned or thereafter to be acquired by it; to have and to hold all of the property described in said mortgage unto your orator, as trustee, and its successors and assigns forever, in trust, to secure the payment equitably and ratably, without preference or priority of one kind over another of said bonds. A true copy of said mortgage is annexed to this Bill of Complaint as a part hereof, marked "Exhibit A," which your orator prays may be taken in all respects as if fully set forth in the body of this Bill.

Seventh.—That said mortgage duly authorized, made, executed and delivered in all respects in conformity with law, and your orator duly accepted the trust created by and in said mortgage which was duly filed for record as a real and chattel mortgage in all the counties of said States of Washington and Oregon in which the property pledged by mortgage was situated, to wit: In the office of the Recorder of Conveyances in and for the County of Columbia, State of Oregon on the twenty-sixth day of May, 1911, at 9:30 o'clock in the forenoon thereof, and recorded in the Records of Mortgages of Real Property in Book R thereof at page 547, and indexed in the general index of mortgages of personal property or chattel mortgages, as well as in the general index of mortgages of real property; in the office of the

Recorder of Conveyances in and for the County of Washington, State of Oregon, on the twenty-sixth day of May, 1911, at 3:15 o'clock in the afternoon of said day, and recorded in the Records of Mortgages of Real Property in said office in Book 61 thereof at page 500 and indexed in the general index of mortgages of personal property or chattel mortgages as well as in the general index of mortgages of real property; in the office of the County Auditor of the County of Clarke in and for the State of Washington on the twenty-sixth day of May, 1911, at 4:20 o'clock in the afternoon of said day, and recorded in said office in the Records of Mortgages of Real Property in Book 89 thereof at page 302, and in the Records of Mortgages of Personal Property in Book G thereof at page 217, a duplicate original of said mortgage being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; in the office of the County Auditor in and for the county of Cowlitz in the State of Washington on the twenty-sixth day of May, 1911, at nine o'clock in the forenoon of said day and recorded in the Records of Mortgages of Real Property in Book 53 thereof at page 120, and in the Records of Mortgages of Personal Property in Book 16 thereof at page 410, a duplicate original of said instrument being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington; and in the office of the County Auditor of the County of Lewis in the State of

Washington on the twenty-sixth day of May, 1911, at 3:15 o'clock in the afternoon of said day and recorded in said office in the Records of Mortgages of Real Property in Book 70 thereof, at page 1, and in the Records of Mortgages of Personal Property in Book 9 thereof at page 161, a duplicate original of said instrument being filed in a file kept in said office in accordance with the provisions of Section 8782 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

Eighth.—That forthwith upon the execution, delivery and recording of said mortgage Washington-Oregon Corporation duly executed bonds of the issue described in said mortgage of the aggregate par value of principal of \$1,500,000, all of which bonds were duly certified by your orator in all respects as provided in said mortgage, and as so authenticated were duly issued and delivered by your orator in the manner provided in and by said mortgage. That in or about the month of October, 1911, pursuant to the provisions of Article I of said mortgage and pursuant to a duly executed order in writing of the treasurer of Washington-Oregon Corporation, stating the amount of bonds required, to wit, bonds of the par value of principal of \$200,000, and the purpose for which the same were required, to wit, in order to provide funds for the acquisition of certain property, for the construction of certain machinery and lines, and for future extensions, improvements and betterments to the property of Washington-Oregon Corporation then owned or thereafter to be acquired, and upon the delivery to your orator of a

certified copy of a resolution of the board of trustees of Washington-Oregon Corporation duly passed at a meeting of its board of trustees at a meeting thereof duly called and held, authorizing the execution and delivery of such certificate, together with a sworn statement of the president or vice-president of Washington-Oregon Corporation that said bonds or the proceeds thereof were to be used for the purposes therein set forth, your orator duly certified and delivered to Washington-Oregon Corporation bonds of the par value of principal of \$200,000. All of said bonds, with the exception of bonds of the par value of \$5500, which are retained by Washington-Oregon Corporation, and bonds of the par value of \$131,000, which were duly retired by Washington-Oregon Corporation, in accordance with the provisions of said mortgage, are now outstanding, and your orator is informed and believes, and therefore avers, that said bonds so issued and delivered, and all of them, to wit, bonds of the par value of principal of \$1,563,500, have been duly issued, negotiated and sold to divers persons who have thereby become *bona fide* holders thereof as purchasers of the same for value, and that all of said bonds are now, and since and prior to April 1st, 1914, have been, outstanding, valid, binding and subsisting obligations of Washington-Oregon Corporation.

Ninth.—That subsequent to the execution, delivery and recording of said mortgage as aforesaid and prior to the commencement of this suit Washington-Oregon Corporation acquired by several deeds under seal within such times duly executed and delivered

to Washington-Oregon Corporation and within such times duly recorded in the proper offices in the several counties wherein the property conveyed by said, respective deeds was situated, certain property, a description whereof is contained in a certain schedule, marked "Exhibit B," which is annexed to this Bill of complaint and made a part hereof.

Tenth.—That subsequent to the execution, delivery and recording of said mortgage as aforesaid and prior to the commencement of this suit, and pursuant to the provisions contained in Article II of the said mortgage and pursuant to the several certificates of the president or of the vice-president of Washington-Oregon Corporation, under the seal of said corporaiton, attested by its secretary certifying to the adoption of several resolutions by its board of trustees requesting such releases and stating that the prices to be obtained upon the proposed sales thereof to the proposed purchasers were the fair and reasonable value thereof, your orator, by several instruments in writing under seal then duly made and delivered, duly released from the operation and effect of said mortgage the property described in a certain schedule, marked "Exhibit C," which is annexed to this Bill of Complaint and made a part hereof.

Eleventh.—That subsequent to the execution and recording of said mortgage and prior to the commencement of this suit, the City of Centralia duly acquired, free from all incumbrances, the property described in a certain schedule marked "Exhibit D," which is annexed to this Bill of Complaint and made

a part hereof, and said last-mentioned property was thereupon duly released from the operation and effect of said mortgage.

Twelfth.—That on the first day of April, 1914, Washington-Oregon Corporation made default in the payment of the installment of interest due on that day on all of said bonds issued and outstanding and secured by said mortgage as aforesaid; that Washington-Oregon Corporation has not provided any fund with which to pay the said installment of interest or any part thereof, and that the whole of said installment of interest remains due and unpaid.

Thirteenth.—That pursuant to the provisions of Article VII of said mortgage the holders of a majority in value of the outstanding bonds secured by said mortgage on or about the twentieth day of July, 1914, duly elected and duly notified in writing Washington-Oregon Corporation and your orator that they elected, that the whole principal of all the bonds secured by said mortgage should forthwith be declared in writing by your orator to be and should immediately become due and payable, and thereupon and on or about the twentieth day of July, 1914, your orator duly declared in writing and notified Washington-Oregon Corporation that the whole principal of all the bonds secured by said mortgage was forthwith due and payable.

Fourteenth.—That on or about the twentieth day of July, 1914, in accordance with the provisions of Article VII of said mortgage the holders of a majority in value of the outstanding bonds secured by said mortgage duly requested your orator, by an instru-

ment in writing signed by them, to enforce their rights under said mortgage and to institute proceedings for the foreclosure of the property mortgaged and pledged to your orator by said mortgage.

Fifteenth.—That each of the defendants, Independent Electric Company and Willis D. Hoag, has or claims to have some interest or lien in the property or a part thereof, pledged by said mortgage, which interest, if any, is subsequent and subordinate to the lien of said mortgage.

Sixteenth.—That it is provided in Article X of said mortgage that upon the filing of a Bill in Equity or commencement of other judicial proceedings to enforce the rights of your orator as trustee and of the bondholders under said mortgage, your orator shall be entitled to the appointment of a Receiver or Receivers of the property pledged by said mortgage and of the tolls, earnings, income, rents, issues and profits thereof pending such proceedings, with such powers as the Court making such appointment shall confer.

Seventeenth.—Your orator alleges upon information and belief that Washington-Oregon Corporation is insolvent; that Washington-Oregon Corporation defaulted in the payment of taxes upon its property for the year 1913 in an amount exceeding \$25,000, and that it was necessary for your orator, under the provisions of said mortgage, to pay said taxes together with the accrued interest and penalties thereon, said payments aggregating the sum of \$25,902.68, whereof \$5319.50 was paid on June 10th, 1914, and whereof \$20,583.18 was paid on July

13th, 1914, in order to prevent sales of property of Washington-Oregon Corporation by the sheriffs of the respective counties, in which such taxes were assessed and imposed, and in which said property was situated; that Washington-Oregon Corporation has made default in the payment of the installment of interest due on July 1st, 1914, upon the principal amounting to \$350,000, secured by a certain mortgage made by Twin City Light and Traction Company to Standard Trust Company of New York, as trustee, which last-mentioned mortgage is more particularly described in said mortgage to your orator, said installment of interest amounting to the sum of \$10,500; that Washington-Oregon Corporation defaulted in the payment of the installment of interest due on April 1st, 1914, upon the principal amounting to \$400,000 secured by a certain mortgage made by Washington-Oregon Corporation to The Philadelphia Trust, Safe Deposit and Insurance Company, as trustee, dated the first day of April, 1913, and duly recorded in the proper offices in the counties of Washington and Oregon where the property described in said last-mentioned mortgage was situated, said installment of interest amounting to the sum of \$12,000; that Washington-Oregon Corporation has defaulted in the payment of principal and interest of due and outstanding bills, payable exceeding the sum of \$250,000; that said Washington-Oregon Corporation has defaulted in the payment of accounts due and payable exceeding the sum of \$100,000; that the creditors of Washington-Oregon Corporation are numerous and that they

have threatened to institute suits to enforce their claims and that such suits may at any time be commenced and judgments entered therein, upon which executions will issue under which portions of the property of Washington-Oregon Corporation will be sold, thus resulting in the dismemberment of the plants, systems, rolling stock and other property of Washington-Oregon Corporation, the dissipation of its assets, and the interruption and disorganization of its business, to the great injury of your orator and of the holders of the bonds secured by said mortgage, and of the communities served by Washington-Oregon Corporation; that in certain of the communities, which until recently were satisfactorily served by Washington-Oregon Corporation, the municipal authorities have themselves supplied, or have negotiated with other firms and corporations for the supply of, water and electric power, whereby Washington-Oregon Corporation has sustained a serious loss of business and profits, and there is grave danger that other business will be lost to Washington-Oregon Corporation unless the relief herein prayed for be granted; that during the past six months the operating expenses of Washington-Oregon Corporation have substantially increased and the gross earnings have substantially decreased; that the property subject to the lien of said mortgage is inadequate security for the protection of the holders of the bonds issued thereunder and that unless a Receiver of such mortgaged property be appointed the interest of your orator and of the bondholders secured by said mortgage will be greatly injured and the value

of the security which your orator has for their protection will be further greatly impaired and diminished; and that it is necessary for the protection of your orator and of the holders of all of the bonds issued and outstanding under said mortgage, that a Receiver be appointed in this cause of the property mortgaged and pledged to your orator as trustee as aforesaid and of the tolls, earnings, income, rents, issues and profits thereof.

Eighteenth.—Your orator further shows that no proceedings at law or in equity have been begun or commenced by your orator, or, as your orator is informed and believes, by any holder of any of the bonds secured by said mortgage, or of any coupon thereto annexed, to enforce the payment of the sums so covenanted to be paid by Washington-Oregon Corporation under the terms of said mortgage, and that the amount of the controversy in this suit exceeds \$3000 exclusive of interest and costs.

Wherefore and forasmuch as your orator is remediless in the premises according to the strict rules of common law and can have relief only in a court of equity where matters of this kind are properly cognizable your orator prays equitable relief, as follows:—

1. That said defendants may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and as particularly as if they were herein expressly and particularly interrogated concerning the same, but not under oath, answer under oath being hereby expressly waived.

2. That a decree be made directing that all properties real and personal acquired by or on behalf of Washington-Oregon Corporation since the recording of said mortgage as hereinbefore stated shall be taken to be subject to the lien and remedies provided for by such mortgage as fully and completely as though particularly described therein.

3. That a decree be made that the lien of said mortgage be established as a lien upon all the premises, franchises and other property, real and personal in said mortgage described, except such as have heretofore been conveyed by Washington-Oregon Corporation in accordance with Article II of said mortgage; that said mortgage is a lien upon all property, real and personal, acquired by Washington-Oregon Corporation since the recording of said mortgage, superior to the lien, if any, of each and all of the defendants and of all other claims, liens and encumbrances created subsequent to the recording of said mortgage and that the rights of all holders of bonds issued under said mortgage, in any and all the property, real and personal, of Washington-Oregon Corporation, mortgaged to secure the same, may be ascertained.

4. That a decree be made fixing the amount due upon said mortgage bonds outstanding, principal and interest, secured by said mortgage.

5. That a decree be made that the defendant, Washington-Oregon Corporation, do pay what shall appear to be due upon the ascertainment of all principal and interest unpaid upon said bonds and all expenses incurred by your orator as trustee before

the actual sale of the mortgaged premises under such decree, together with said sums aggregating \$25,902.-68 expended by your orator for the payment of taxes as aforesaid.

6. That a decree be made that in case the amount thus ascertained to be due as principal and interest upon the bonds outstanding and secured by said mortgage and for expenses and for the payment of taxes as aforesaid shall not be paid to your orator within the time to be limited by decree of your Honorable Court, the defendants, Washington-Oregon Corporation, Independent Electric Company and Willis D. Hoag, and all persons claiming under them or any of them any interest in said mortgaged property, and that all persons making claims as supply creditors or otherwise, to priority over said mortgage and all persons claiming under them or any of them, be absolutely barred and foreclosed of every right or equity of redemption of, in, and to the property conveyed by said mortgage or since acquired by or on behalf of Washington-Oregon Corporation and now held under such mortgage, and that a sale of the whole of the mortgaged property in one lot or parcel be ordered in accordance with the law and practice of this Honorable Court, and that the proceeds may be applied to the expenses of this suit and the compensation and disbursements of your orator as trustee in the execution of its trusts, to the payment of the amounts found to be due and unpaid upon the bonds outstanding and secured by said mortgage to the payment of your orator of said amounts expended by your orator for the payment

of taxes as aforesaid with interest thereon from the time of such payments, and the balance, if any, as the Court may direct.

7. That a decree be made that if the proceeds of sale shall be insufficient for the payment of the expenses of said trusts and costs of sale, said amounts expended for the payment of taxes, and all of the principal and interest of said outstanding bonds issued under said mortgage as aforesaid, the defendant, Washington-Oregon Corporation, may be adjudged to pay any deficiency thereof.

8. That a decree be made making proper allowances to your orator as trustee and its counsel for their respective expenses, compensation and fees.

9. That a decree be made that at said sale the purchase money may be paid either in cash or by owners of bonds secured by said mortgage in said bonds to such extent as said bonds shall be entitled to payment in cash out of the proceeds of sale.

10. That a decree be made appointing a receiver with the usual powers of receivers in like cases of the property pledged by said mortgage and of all other properties of Washington-Oregon Corporation, and of the tolls, earnings, income, rents, issues and profits thereof, and to preserve, manage and operate said property and to collect such tolls earnings, income, rents, issues and profits pending the sale thereof pursuant to the decree of this Honorable Court and to hold and dispose of such tolls, earnings, income, rents, issues and profits as this Honorable Court may direct, and that pending this suit a writ of injunction may be issued out of and under the seal of this Hon-

orable Court, directing, enjoining and restraining the said defendant, Washington-Oregon Corporation, its officers, agents and all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property secured by said mortgage and any other property of Washington-Oregon Corporation.

11. That your orator may have such other and further relief as to this Honorable Court shall seem just.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this Bill of Complaint to be issued to said Washington-Oregon Corporation, but also a writ of subpoena directed to said defendants, Washington-Oregon Corporation, Independent Electric Company and Willis D. Hoag, commanding them and each of them at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court then and there to answer the premises and to abide by the order and decree of the Court herein and that they may appear herein according to law.

FIDELITY TRUST COMPANY,

By WM. P. GEST,

Vice-President.

[Corporate Seal]

Attest: T. H. ATHERTON,

Asst. Secretary.

GEO. W. PEPPER,

RANDOLPH W. CHILDS,

Solicitors for Complainant.

of taxes as aforesaid with interest thereon from the time of such payments, and the balance, if any, as the Court may direct.

7. That a decree be made that if the proceeds of sale shall be insufficient for the payment of the expenses of said trusts and costs of sale, said amounts expended for the payment of taxes, and all of the principal and interest of said outstanding bonds issued under said mortgage as aforesaid, the defendant, Washington-Oregon Corporation, may be adjudged to pay any deficiency thereof.

8. That a decree be made making proper allowances to your orator as trustee and its counsel for their respective expenses, compensation and fees.

9. That a decree be made that at said sale the purchase money may be paid either in cash or by owners of bonds secured by said mortgage in said bonds to such extent as said bonds shall be entitled to payment in cash out of the proceeds of sale.

10. That a decree be made appointing a receiver with the usual powers of receivers in like cases of the property pledged by said mortgage and of all other properties of Washington-Oregon Corporation, and of the tolls, earnings, income, rents, issues and profits thereof, and to preserve, manage and operate said property and to collect such tolls earnings, income, rents, issues and profits pending the sale thereof pursuant to the decree of this Honorable Court and to hold and dispose of such tolls, earnings, income, rents, issues and profits as this Honorable Court may direct, and that pending this suit a writ of injunction may be issued out of and under the seal of this Hon-

orable Court, directing, enjoining and restraining the said defendant, Washington-Oregon Corporation, its officers, agents and all other persons whomsoever from interfering with, transferring, selling or disposing of any of the property secured by said mortgage and any other property of Washington-Oregon Corporation.

11. That your orator may have such other and further relief as to this Honorable Court shall seem just.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this Bill of Complaint to be issued to said Washington-Oregon Corporation, but also a writ of subpoena directed to said defendants, Washington-Oregon Corporation, Independent Electric Company and Willis D. Hoag, commanding them and each of them at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court then and there to answer the premises and to abide by the order and decree of the Court herein and that they may appear herein according to law.

FIDELITY TRUST COMPANY,

By WM. P. GEST,

Vice-President.

[Corporate Seal]

Attest: T. H. ATHERTON,

Asst. Secretary.

GEO. W. PEPPER,

RANDOLPH W. CHILDS,

Solicitors for Complainant.

State of Pennsylvania,
County of Philadelphia,—ss.

William P. Gest, being duly sworn, says that he is an officer, to wit, Vice-President of the Fidelity Trust Company, the complainant in this suit; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained are true to his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he is informed and believes the same to be true; that the seal affixed to said bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

WM. P. GEST.

Subscribed and sworn to before me this 23d day of July, 1914.

[Seal]

ANDREW B. MCGINNIS,
Notary Public.

My commission expires March 10, 1917.

I am not a stockholder, director, officer or clerk in said corporation.

ACKNOWLEDGMENT (Notary).

16285.

State of Pennsylvania,
County of Philadelphia,—ss.

I, Henry F. Walton, Prothonotary of the County of Philadelphia, and Clerk of the Court of Common Pleas of said County, which are Courts of Record having a common seal being the officer authorized by the laws of the State of Pennsylvania to make the

following Certificate, do Certify, That Andrew B. McGinnis, Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed Instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania, residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature, as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 23 day of July, in the year of our Lord, One Thousand Nine Hundred and Fourteen (1914).

(Seal)

HENRY F. WALTON,

Prothonotary.

(Exhibits are attached to this bill of Complaint.)

(Filed July 31, 1914.)

[Endorsed]: No. 15—Equity. United States District Court, Western District of Washington. In Equity. Fidelity Trust Company, Trustee, Complainant, vs. Washington-Oregon Corporation, Independent Electric Company and Willis D. Hoag,

Defendants. Bill of Complaint. G. W. Pepper,
R. W. Childs, Solicitors for Complainant. Land
Title Building, Philadelphia, Pa.

**[Certificate of Clerk, U. S. District Court to
Supplemental Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing and attached is the transcript of the Bill of Complaint (without the attached exhibits); the Exhibit "D," being only the first eight pages of said exhibit; and Exhibit "E," these two last exhibits being attached to the Supplemental Bill of Complaint, as the originals thereof appear on file in the case of Fidelity Trust Company, Trustee, vs. Washington, Oregon Corporation, Independent Electric Company, and Willis D. Hoag, No. 15—Equity, in this court, at Tacoma; the foregoing being a Supplemental Transcript requested by counsel for the plaintiff herein.

I further certify that the following is a full, true and correct statement of the expenses costs, fees, and charges incurred and paid in my office, by and on behalf of the petitioner herein (Fidelity Trust Company, Trustee) for making this supplemental transcript herein for filing in the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.)
for record, certificate and return,
81 fo. @ 15¢.....\$12.15
Certificate of Clerk to transcript, 2
folios @ 15¢..... .30
Seal to said Certificate..... .20

ATTEST my hand and the seal of the United
States District Court for the Western District of
Washington, at Tacoma, this 10th day of May, A. D.
1916.

[Seal]

FRANK L. CROSBY,
Clerk.

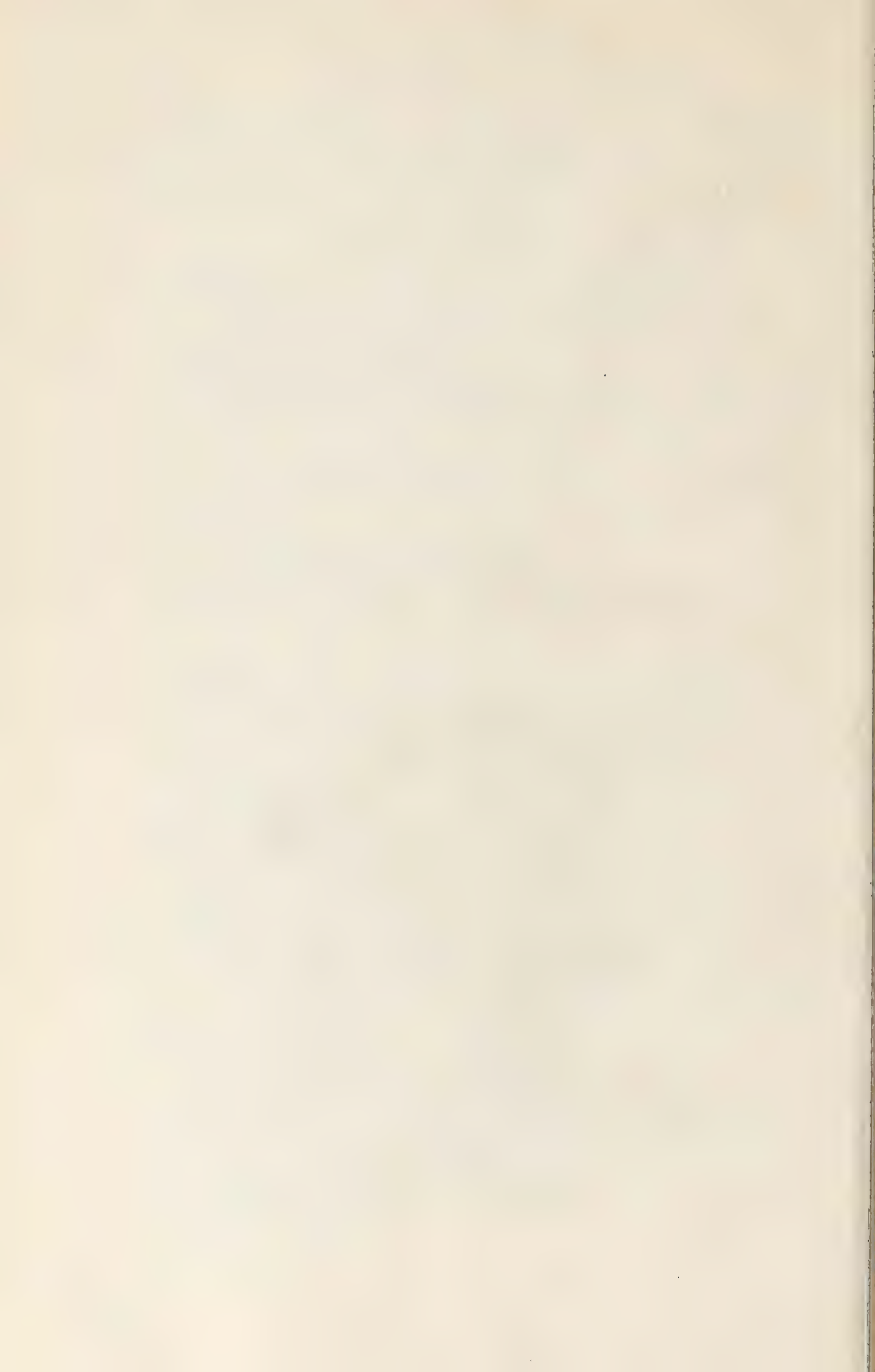
By E. C. ELLINGTON,
Deputy Clerk.

[Endorsed]: No. 2768. United States Circuit
Court of Appeals for the Ninth Circuit. Crane Com-
pany, a Corporation, Appellant, vs. Fidelity Trust
Company, Trustee, a Corporation, and Washington-
Oregon Corporation, Independent Electric Com-
pany, a Corporation, and Willis D. Hoag, Appellees.
Supplemental Transcript of Record. Upon Appeal
from the United States District Court for the West-
ern District of Washington, Southern Division.

Filed May 13, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States Circuit Court of Appeals ³

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation,
Appellant,
vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON - OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

MAURICE W. SEITZ,
Solicitor for Appellant,

RANDOLPH W. CHILDS, MAURICE A. LANGHORNE,
F. D. METZGER,
Solicitors for Appellee.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation,
Appellant,
vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON - OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

STATEMENT.

The defendant, Washington-Oregon Corporation, at the time of the furnishing of the merchandise by the intervenor as hereinafter stated, was a corporation engaged throughout the states of Washington and Oregon in the operation of electric railways, lighting and water systems; that between the 1st of January, 1911, and the 15th of July, 1914, the intervenor, Crane Company, sold to the said Wash-

ington-Oregon Corporation water pipes, gas and water mains and other necessary equipment, upon which at the time of the appointment of the Receiver hereinafter referred to, there was owing a balance to Crane Company in the amount of \$11,146.67. It appears from the record that in May, 1911, the Washington-Oregon Corporation executed a mortgage or deed of trust to the plaintiff appellee, Fidelity Trust Company, as Trustee to secure an authorized bond issue to the amount of \$5,000,000.00, said bonds bearing 6% interest, maturing on the 1st day of April and the 1st day of November of each year. Interest was paid upon the bonds issued under said mortgage up to November 1st, 1913, the defendant corporation defaulting in the payment of interest falling due on April 1st, 1914. Suit was instituted to foreclose the mortgage because of the default in the payment of this interest, and a Receiver was appointed who took charge of the properties on July 31st, 1914. Thereafter Crane Company filed its intervening petition in said foreclosure proceedings asking that its claim to the amount hereinbefore stated be declared prior to the mortgage indebtedness and that out of the proceeds of said mortgaged property, or out of the income of said receivership, that its claim be paid. The Receiver and complainant filed their answer to the intervening petition and the cause was submitted upon a stipulated statement of facts, resulting in a finding by the district court that the intervenor's claim was not preferred except to the ex-

tent of \$56.03, representing materials which were furnished during June and July, 1914, within the sixty days prior to the appointment of the Receiver.

This stipulation, which is incorporated in the record herein, admits the furnishing of the materials during the time, in the amount and of the nature stated, and admits the diversion of current income of the Washington-Oregon Corporation during the time the account accrued to the Fidelity Trust Company for the payment of interest on the bonds. It also admits the insolvency of the Washington-Oregon Corporation and the necessity of the intervenor establishing a preference over the mortgage security if it is to be paid at all. The several contentions raised by the complainant in opposition to the allowance of the claim are as follows:

1. That the materials furnished were not of a character or for a purpose that would bring them within the doctrine of preference.

2. That the claim of the intervenor was stale, having accrued more than six months prior to the appointment of receiver.

3. That the doctrine of preferential claims is not applicable to corporations of the character of the mortgagor, being applicable only to railroads.

The above propositions practically present the questions to be determined on this appeal.

While the appellant has assigned specific errors, all may be grouped under the one proposition that the trial court erred in refusing to decree the inter-

venor entitled to a preference over the mortgage bondholders to the amount of \$11,146.67. Detailed facts will appear during the course of the argument, therefore for the sake of brevity a further preliminary statement will be omitted.

POINTS AND AUTHORITIES.

I.

The basis of the doctrine of preferential claims is, that at the time of the execution of the mortgage the mortgagee impliedly agrees that the current earnings of the mortgagor will be devoted first, toward the payment of the creditors furnishing supplies and materials necessary in the operation and conduct of the business,

Moore v. Donahoo, 217 Fed. Rep. 184.

II.

Materials furnished for necessary operating and managing expense or for proper equipment and useful improvements, or materials furnished that have aided to conserve the mortgaged property and keep the same in a proper state of repair, are generally given priority over the mortgage security upon a foreclosure in equity.

Fosdick v. Schall, 99 U. S. 250.

Farmers Loan & Trust Co. v. K. C. & W. N. Ry. Co., 53 Fed. Rep. 184.

Va. & Ala. Coal Co. v. Ry. Co., 170 U. S. 355.

Union Trust Co. v. Illinois Midland Ry. Co.,
117 U. S. 462.

Miltenberger v. Logansport, etc., Ry., 106 U. S. 286.

N. P. Ry. Co. v. Lamont, 69 Fed. Rep. 24.

Union Trust Co. v. Morrison, 125 U. S. 609.

Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257.

Loveland, et al. v. Blair, 222 Fed. Rep. 210.

Union Trust Co. v. Souther, 107 U. S. 594.

III.

In determining whether or not the intervenor furnishing materials in the reliance and understanding that they would be paid out of the current earnings of the corporation, the court should take into consideration the manner and amount in which the goods were furnished, the period over which they were furnished and the manner in which they were to be paid for.

So. Ry. Co. v. Carnegie Steel Co., 176 U. S. 257.

IV.

After a diversion of the current income to the mortgage creditors has been established the mortgage creditors become obligated upon a foreclosure of the mortgage to make restoration. This is true regardless of the time within which the claim of the intervenor accrued, provided always that the claim is not barred by the statute of limitations.

Moore v. Donahoo, 217 Fed. Rep. 184.

Bellingham Bay Imp. Co. v. Fairhaven & N. W. Ry. Co., 17 Wash. 371; 49 Pac. Rep. 514.

V.

The payment of interest on the bonded debt out of the current income is a diversion within the authorities.

Burnham v. Bowen, 111 U. S. 776.

Va. & Ala. Coal Co. v. Central Ry. Co., 170 U. S. 355.

Clark v. Central Ry. & Banking Co., 66 Fed. Rep. 806.

VI.

The income of a receivership should be used in the same manner as the mortgagor would have been bound to use it, if a receiver had not been appointed. Therefore the income of the receivership should be applied toward the payment of current creditors.

Burnham v. Bowen, 111 U. S. 776.

Gregg v. Metropolitan Trust Co., 197 U. S. 182.

International Trust Co. v. Townsend Brick Co., 95 Fed. Rep. 850.

Hale v. Frost, 99 U. S. 389.

VII.

There is no so-called "six months' rule."

The only time restriction seems to be, that the claim must have accrued within some reasonable time, depending upon the circumstances of the particular case.

Farmers' Loan & Trust Co. v. Ry., 53 Fed. Rep. 187.

Trust Co. v. Morrison, 125 U. S. 591.

Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 285.

Burnham v. Bowen, 111 U. S. 776.

N. Y. Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co., 83 Fed. Rep. 367.

VIII.

The equities of Crane Company entitle it to the preference prayed for.

IX.

The doctrine of preferential claims applies to all character of public service corporations.

Ill. Trust & Savings Bk. v. O. & E. Ry. Co., 89 Fed. Rep. 236.

Reyburn v. Consumers' Gas, Fuel & Lighting Co., 29 Fed. Rep. 563.

U. S. Investment Corp. v. Portland Hospital, 40 Ore. 523; 67 Pac. Rep. 195; 56 L. R. A. 627.

Homer v. Baltimore Refrig. & Heating Co., 117 Md. 411; 84 Atl. Rep. 176.

Ellis v. Vernon Lighting & Water Co., 86 Tex. 109.

Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. Rep. 39.

Reinhart v. Augusta M. & I. Co., 94 Fed. Rep. 901.

ARGUMENT.

With a view of comprehending all of the legal questions involved and for convenience of argument, I will divide the discussion into the several propositions which seem essential under the authorities to the establishment of the intervenor's claim.

I.

Basis of Doctrine.

This court is familiar with the doctrine of preferential claims in foreclosure proceedings of this character, and to indulge in a lengthy explanation of the theory upon which the doctrine is based would be superfluous. This court, in the case of *Moore v. Donahoo*, 217 Fed. Rep. 184, after reviewing the foundation of the doctrine, stated it thus :

“The real basis upon which the preference rests is thought to be the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto.”

It would seem, therefore, that we can approach this question on the assumption that at the time of the execution of the mortgage the mortgagee impliedly agreed that the creditors furnishing materials and supplies coming within the requisite qualification have the first claim to the income.

II.

The Nature and Character of Preferential Claims.

It would be impossible from a review of the authorities to state a definition of preferential claims that would apply in all cases. As near as we can come to accuracy will be to review the principal and leading authorities on the subject, and then apply the facts under discussion. With this idea in mind, I will review the decisions and endeavor to present to the court the various elements that appear to have been adjudged necessary in determining the class and character of claims that should be preferred above the mortgage creditors. The history of this doctrine began in the case of *Fosdick v. Schall*, 99 U. S. 250. Here the court, in defining the character and class of claims allowable, said: "For necessary operating and managing expense, proper equipment and useful improvements."

We find the same expression in a case decided in this circuit, the case of *Moore v. Donahoo*, 217 Fed. Rep. 184.

In the case of *Farmers' Loan & Trust Company v. K. C., W. & M. Ry. Co.*, 53 Fed. Rep. 187, the doctrine is stated thus:

"Preferential debts it is commonly said are those which have aided to *conserve the property* and have been contracted within some reasonable period."

In the case of *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 462, ties, rails, turntables and

fences were considered in the way of necessary repairs and operating expenses.

In the case of *Miltenberger v. Logansport, etc., Ry.*, 106 U. S. 286, the court held that the adjustment of freight balances with other railroads had priority over the mortgage creditors, on the theory that a failure to pay the freight balances would cause, no doubt, a severance of relations, which, in turn, would cripple the road. This case alone would justify the allowance of any claims made necessary to retain and protect the franchises of defendant corporation.

In the case of *N. P. Ry. Co. v. Lamont*, 69 Fed. Rep. 24, the court held that "providing, furnishing and maintaining waiting rooms" should be considered necessary operating expenses and entitled to priority.

In the case of *Union Trust Co. v. Morrison*, 125 U. S. 609, a priority was allowed under these conditions: Morrison became surety on an injunction bond at the mortgage debtor's request to prevent the property of the company being levied upon. The court in allowing the claim priority over the mortgaged security said:

"The ground of the claim is that a portion of the property covered by the mortgage being in peril of abstraction and loss, was rescued and saved to the mortgage by the act of the petitioner. It is denied that the property was in any peril because, as contended by the respondent, it could not have been taken upon execution by reason of the prior lien of the

mortgage. But it must be conceded that until the mortgage was enforced by entry or judicial claim, the personal property of the railroad company was subject to its disposal in the ordinary course of business, and such was liable to be seized and taken on execution for its debts. * * * Even if it would have been subject to the mortgage when taken on execution, nevertheless it could have been taken, and this would necessarily have disturbed and perhaps interrupted the operation of the road, by separating property seized from the corpus of the estate. The trustee of the mortgage might have prevented such a catastrophe, it is true, by filing a bill in foreclosure and for an injunction and receiver, but they did not choose to take this course until nearly three years afterward. On the contrary, they allowed the railroad to continue to use the property and take care of it for them and stood by and saw Morrison put his hands into the fire and rescue the rolling stock, of which they were to receive the benefit. * * * Morrison's money or the fruits of it has gone into their pockets."

In the case of the *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, in allowing the Carnegie Steel Co.'s claim as preferred, the court defined it thus:

"Debts of a railway company contracted in the ordinary course of its business."

And further from the same opinion, page 285:

"That within this rule a debt not contracted upon the personal credit of the company, but to keep the railroad itself in condition to be

used with reasonable safety for the transportation of persons and property and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt."

In the case of the *Toledo Railway Co. v. Hamilton*, 134 U. S. 305, the court in effect held that a claim which could not be classed as original construction must be classed as for current expense.

In the case of the *Union Trust Co. v. Souther*, 107 U. S. 594, the court in discussing the character of claims which should be allowed, covered the subject as follows:

"To this we adhere, and, in our opinion, the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses. * * * Many other circumstances may make such an order reasonable, and this case furnishes a striking example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession, as they had the right to do, when the default had continued for six months. On the contrary, notwithstanding no payments of interest had been made, they allowed the company to operate the road and incur obligations therefor until December, 1877. This was evidently in the hope that their condition would be improved by the delay; for to effect the forbearance, they established an agency, and incurred expenses to an amount much larger than the \$3,000 reimbursed by the company. Prior

to the appointment of the receiver, the gross earnings do not appear to have been enough to pay expenses, but afterwards they yielded a very considerable surplus. There cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as a condition of granting their application for a receiver, *that debts incurred by the company in thus protecting the security should be paid from the income of the receivership*, if, in consequence of an increase of revenue, it could be done.”

As was stated in the case of *Miltenberger v. Ry.*, 106 U. S. 286:

“Many circumstances may exist which make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes out of the earnings of the receivership, or even the corpus of the property.”

In the case of *St. Louis Trust Co. v. Riley*, 70 Fed. Rep. 36, Judge Sanborn, after a thorough review of the authorities covering the question of preferred claims, stated as follows:

“From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

“First. There are certain claims against the mortgaged railroad company accruing before

the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

“Second. It is an indispensable element of every such claim that it is founded upon *property furnished or services rendered to the mortgagor, which either preserved or enhanced the value of the security of the mortgage debt*, and thereby inured to the benefit of the mortgagee.

“Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds—*either on the ground that the mortgage is a lien upon the net, and not the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted funds by taking an equal amount from the earnings of the railway company during the receivership and applying it to the payment of these claims in preference to the mortgage debt*, or on the ground that payment of the claims is necessary to preserve the mortgaged railroad and keep it a going concern.”

It would seem that the theory upon which these preferences were allowed was, that inasmuch as the

income had been improperly diverted, it was no more than equitable that the bondholders should be compelled to make restoration. This theory is again announced in one of the very latest cases touching the subject, namely:

Loveland, et al. v. Blair, 222 Fed. Rep. 210.

“The problem usually presented in such contests (meaning contests to establish preference) is whether income properly applicable to operating expenses has been diverted by the mortgagor to the payment of mortgage indebtedness and to the prejudice of claimants who have, within a limited time prior to the receivership, rendered services, furnished supplies, or the like, to the railroad, and to the enhancement alike of the property and the securities upon it. Where such a diversion is shown, the bondholders may, under an appropriate issue, be required to reimburse the fund applicable to the payment of ‘debts of the income’ to the extent of the diversion. This is upon the principle of restoration.”

It will be noted in this case from an inspection of the receiver's reports, which are incorporated in the stipulation, that the materials furnished by Crane Company did actually enhance the value of the security and were incorporated in the mortgaged property. Furthermore, it will appear later that there was a substantial diversion of the current income toward the payment of interest on the mortgage indebtedness.

The following cases show the purposes for which claims have been allowed, and by comparison it will be seen that they follow very closely to the case at bar. I confess I am unable to differentiate. It is certain, at least, that these cases are broad enough to include the materials for which Crane Company is seeking to impress a priority:

1. In *Central Trust Company v. Wabash, et al. Ry.*, 30 Fed. 332, over \$200,000 of claims were allowed for borrowed money in order to provide means for the meeting of its expenses and the keeping of its road in successful operation, and completing its line.

2. In *Trust Co. v. Clark*, 26 C. C. A. 397, 81 Fed. 269, preference was given to a claim for a gear wheel and pinion.

3. In *Manhattan Trust Co. v. Sioux City Cable Co.*, 76 Fed. 658, for power furnished a street railway.

4. In *Railroad Co. v. Wilson*, 138 U. S. 501, a preferential claim was allowed for attorneys' fees.

5. In *Manhattan Trust Co.* case, 76 Fed. 658, an allowance for an electric generator.

6. In *Cleveland C. & S. Ry. Co.'s* case, 86 Fed. 73, claim allowed for the construction of a railroad bridge.

7. In *Atkins'* case, 3 Hughes, 307 (Fed. Cas. No. 604), for moneys advanced by bondholders and stockholders to pay labor claims.

8. In *Farmers' Loan & Trust Co. v. American Waterworks Co.*, 107 Fed. 23, a claim allowed for

engines, *hydrants*, boilers, valves, etc., furnished the American Water Co. at Omaha.

9. *Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co.*, 71 Fed. 245, claim allowed on account of going on an appeal bond, upon the same principle as *Morrison's* case.

10. *Penn. Mut. Life Ins. Co.'s* case, 141 Ill. 35, 31 N. E. 138, claim allowed for right of way damages.

Let us now look into the character of Crane Company's claim. For convenience in discussion, I will segregate the materials furnished into three groups:

1. Materials furnished which were used for repairs and replacements.

2. Materials that were furnished and used for service connections.

3. Materials that were purchased and used in making extensions and betterments and for the laying of the new mains to take the place of old mains.

1. The following items are included under the first heading:

Exhibit "1"	\$ 26.80
Exhibit "2"	29.23
Exhibit "A-3"	95.72
Exhibit "A-4"	21.87
Exhibit "A-5"	63.82
Exhibit "A-7"	176.80
Exhibit "A-14"	149.66

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Exhibit "A-15"	127.03
Exhibit "A-16"	53.44
Exhibit "A-18"	45.90
Exhibit "A-22"	18.00
Exhibit "B-4"	116.41
Exhibit "B-8"	168.55
Exhibit "B-12"	561.91
Exhibit "B-18"	16.95
Exhibit "C-1"	130.41
Exhibit "C-2"	535.28
Exhibit "C-3"	42.84
Exhibit "C-4"	111.24
Exhibit "C-6"	57.85
Exhibit "D-1"	43.44
Exhibit "D-4"	222.18

Total for repairs and replacements....\$2,815.33

There can be no question about the materials furnished and used for repairs and replacements coming squarely within the class and nature allowable as preferred claims, as reference to the authorities hereinbefore reviewed will show.

No doubt counsel will take exception to my classing under one head repairs and replacements, but in justification of this I call the court's attention to the stipulation which refers to the replacements as being necessary to replace old and worn-out pipe and connections. I draw no distinction between the word "replacements" and "repairs," as to my mind it is obvious that the purpose of replacements necessarily is to take the place of something that

has either become inadequate or out of repair. In any event, they constitute necessary current expenditures. In some instances, also, the stipulation states that the repairs and replacements were used in connection with betterments at the springs. While this is true, yet nevertheless the facts remain that it was used for repair and replacement. We doubt if there can be any question about the materials used as coming squarely within the class allowable as preferred claims. The authorities which I have hereinbefore reviewed so conclusively establish this point that I am willing to submit it without further argument.

2. The following items are included within the second heading, that is, materials which were used for the purpose of making service connections. An explanation will be made of these items, in order that the court may thoroughly understand the purpose. Quoting from the stipulation of facts:

“Exhibit “A-1” consisted of cocks, which were purchased and put in stock and used in connecting customers with the gas mains of the corporation. It is stated, however, that it is not known whether these goods were used prior to the sale of the gas plant, or whether they were sold with the gas plant, amounting to\$ 58.23

Exhibit “A-4” consisted of 993 feet of $\frac{3}{4}$ -inch black pipe which was used for the same purpose, and subject to the same observation as the above, amounting to 30.79

Page Twenty—

Exhibit "A-4," continued, consisted of galvanized pipe used to connect customers with the mains, amounting to.....	21.31
Exhibit "A-4," continued, consisted of corporation cocks used to make connections with the users of water.....	48.75
Exhibit "A-4," continued, consisted of corporation cocks, subject to the same observation as above.....	36.25
Exhibit "A-4," continued, consisted of pig lead which was used in calking pipes in extensions that were made.....	154.03
Exhibit "A-8" consisted of clamps, corporation cocks and stop cocks which were used in making connections with customers, amounting to.....	110.87
Exhibit "A-9" consisted of clamps which were used for the same purposes.....	9.10
Exhibit "A-10" was for soil pipe used for making curb boxes necessary in connections to customers, and also for unions used for the same purpose, amounting to	45.00
Exhibit "A-11" consisted of soil pipe and unions for the same purpose as hereinabove stated	110.14
Exhibit "A-13" consisted of tees which were used on extensions necessary to supply customers	85.50
Exhibit "A-17" consisted of couplings, nipples, valves, ells and cocks which were used in making service connections to customers	302.25

Exhibit "A-19" consisted of 2,007 feet of 2-inch galvanized pipe used for necessary extensions to connect customers.....	300.08
Exhibit "A-21" consisted of clamps which were used for service connections, amounting to	25.20
Exhibit "B-1" consisted of corporation cocks for wooden pipe line used in connections to users of water, amounting to	41.76
Exhibit "B-3" consisted of fittings and other accessories used in making connections to customers.....	66.78
Exhibit "B-7" consisted of small fittings and pipe used for repair and service connections	195.89
Exhibit "B-9" consisted of small fittings and clamps used for connections to customers	38.29
Exhibit "B-10" consisted of cocks and small fittings used for making service connections	79.58
Exhibit "C-5" consisted of galvanized pipe, corporation cocks and other fittings used to connect customers with mains..	173.89
Exhibit "C-7" consisted of 3,610 feet of 2-inch galvanized pipe used for laying the gas mains to connect customers and for connecting dead ends of mains in order to obtain proper circulation.....	551.11
Exhibit "C-8" consisted of corporation cocks, ells, unions and nipples used for service connections	78.59

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Exhibit "D-2" consisted of 4-inch and 2-inch galvanized pipe which was used in making service extensions to supply customers with water.....	356.70
Exhibit "D-3" consisted of corporation cocks, unions, clamps and ells used in making service connections.....	171.38
Exhibit "D-5" subject to the same observation as above	176.84
Exhibit "E-1" consisted of 3/4-inch galvanized pipe used entirely in making service connections to customers.....	41.72
<hr/>	
Total used for service connections.....	\$3,310.03

To recapitulate the authorities hereinbefore referred to, we have the following definition of claims allowable as preferred:

"For necessary operating and managing expense, proper equipment and useful improvement; those which have aided to conserve the property; necessary operating expense and repair; current operating expenses; material furnished and services rendered, which preserved or enhanced the value of the securities."

With the foregoing definition as a preface, it would seem hardly necessary to indulge in a lengthy discussion of the propriety of this classification. Service connections can be classed as nothing more or less than necessary equipment or current operating expenses. In order to properly operate, it became necessary daily, no doubt, to connect applicants for water with the mains of the defendant

company. These connections were necessary to enable the corporation to perform its functions and receive its revenue, its profits necessarily depending upon the amount of water it could sell and the rate it could collect. The only means, as before stated, of delivering it was through service connections. In fact, the business could not otherwise be conducted. I submit, therefore, that nothing could be deemed more essential than the purchasing and using of the necessary equipment to make these connections. Furthermore, it is common knowledge that all public service corporations of the defendant's character uniformly operate under franchises, which compel the public service corporation, in order to retain its franchise, to serve water to the customers of the city as demanded. A strict performance of this duty is essential to the retaining and enjoyment of the franchise, which is admittedly the most valuable asset of the public service corporation. Therefore, it seems logically to follow that whatever was necessary to retain the franchise cannot be classed other than a necessary expense, in order to conserve the property of the corporation.

3. The following items are included under the third heading. These materials were used in replacing old mains and in making betterments. I will also explain these items briefly by quoting verbatim from the stipulation:

Exhibit "A-6" consisted of 6-inch Matheson pipe used in an extension of Thirty-ninth Street in the City of Vancouver.

There had been a 2-inch main on this street, but the same had proven inadequate to supply the customers, and it became necessary to lay these mains in its stead. A further extension was added to it to supply water to the shops of the S., P. & S. Ry. Co.....\$1,868.78

Exhibit "A-12" was a gate valve used as a necessary part of the extension above mentioned 13.61

Exhibit "A-14" consisted of a gate valve used to replace old gate valves in betterments that were made at the springs, the source of the water supply for the City of Vancouver 149.66

Exhibit "A-20" consisted of 6-inch Matheson pipe which was laid on Fourth Plains Avenue in Vancouver. The laying of this main was necessitated in order to supply the users of water and also to connect with fire hydrants, in compliance with the contract with the city. *The laying of these mains and the performance of this contract was made a condition precedent to the renewing of the franchise* 805.26

Exhibit "B-11" consisted of 4-inch and 6-inch Matheson pipe used for mains which were laid in the City of Hillsboro. In explanation of this item we call the court's attention to the fact that the franchise under which the company had operated had expired. Some of the mains of the corporation in the City of

Hillsboro were in an old, worn and leaky condition. In addition, the city desired to pave some of its streets. In the granting of the new franchise, or rather in the renewing of the old, the condition was added that the corporation replace these old mains with suitable and adequate mains. It was in compliance with this franchise and to replace the old and worn-out mains that these materials were purchased.....	1,680.04
Exhibit "B-13" consisted of fittings which were used as a necessary part of the mains and therefore subject to the same observation as above.....	28.50
Exhibit "B-14" subject to the same observation as above.....	28.50
Exhibit "B-15" subject to the same observation as above.....	33.95
Exhibit "B-16" subject to the same observation as above.....	18.30
Exhibit "B-6." This was for 12-inch steel pipe in fittings which were used in crossing Dairy Creek near Hillsboro. It became necessary in compliance with the ordinance for the corporation to run a pipe line from Hillsboro to Sain Creek, a distance of about 12 miles. This main was constructed of wood pipe, but in passing under the creek, wood was deemed impracticable, and this steel pipe was used in its stead.....	392.40

Exhibit "B-2" consisted of 4-inch valves which were used on and as a necessary part of the mains hereinbefore stated..	15.39
Exhibit "B-17" consisted of valves which were used on the 4-inch and 6-inch mains above stated	78.55
Exhibit "B-5" the same as preceding item	17.10
Exhibit "E-2" was used in constructing new mains to supply the Kelso and Wallace schools in the City of Kelso. The company was operating under a franchise making it obligatory to supply said schools with water.....	186.36
<hr/>	
Total amount of merchandise used for the above purpose.....	\$5,316.40

Bearing in mind still the definition hereinabove given, let us examine these items and ascertain if possible whether they measure up to the necessary qualifications. In determining this question, I submit that it is essential for the court to take into consideration the nature of the business in which the corporation was engaged. That becomes particularly necessary, as the authorities are unanimous in saying that each case must rest upon its own peculiar facts. (See *Fosdick v. Schall, supra.*) The preservation of the franchises, as before indicated, was absolutely essential to its continuing in business. Therefore the materials that were furnished in order to do the work necessary to retain them could be classed under the heading of materials furnished to conserve the property of the

corporation. It would seem that the learned judge of the District Court was under the impression that in order to justify expenditures for the purpose of retaining franchises some showing ought to have been made that a failure to perform this work would have resulted in a forfeiture. I do not believe that such a deduction is warranted. A franchise of this character is nothing more or less than a contract between a municipal corporation and a private corporation, wherein the private corporation, denominated the public service corporation, agrees to perform certain specified duties, a failure to perform which would result in a breach of the contract and subject the corporation to a forfeiture. Assuredly the public service corporation cannot assume that a violation of its contract would be ignored or that it would be justified in failing to perform until a forfeiture was threatened. The only way, I submit, to prevent the property, and particularly the rights, under its franchise from becoming jeopardized is to substantially perform. Therefore I contend that the performance of the conditions required by the franchise, the penalty for a violation of which was forfeiture, would justify any such expenditures as necessary to conserve the property. No one would contend that a party's rights under a contract were valuable if he were in default under that contract. Its value must necessarily depend upon the ability of the contracting parties to enforce it, and it is elementary

in the law of contracts that no one has any legal rights under a contract upon which he is in default.

In addition to being necessary under the franchise, the laying of these mains was but the natural normal growth of the corporation. The company operated, as will be seen from the stipulation of facts, in the towns of Chehalis, Centralia, Kelso, Kalama and Vancouver, Washington, and in Hillsboro, Oregon. Each of these cities in its normal growth would demand increasing mains. A main, for instance, that might be fully adequate on one street this year might prove and would no doubt prove wholly inadequate five years hence, and would demand a new and larger main. Mains laid under these circumstances cannot be considered other than necessary improvements and equipment, in order to conduct its business with any degree of facility. That water mains will eventually wear out is obvious, and that the only remedy is to replace is equally plain. All of the mains and extensions above stated were such, and such only, as become necessary to conserve the property of the corporation and enable it to conduct its business in keeping with the growth of the cities, and in compliance with the terms and spirit of its franchises. Furthermore, a considerable portion of the last-mentioned materials were furnished to replace old, worn-out mains. The fact that those laid in place of the old mains were larger and more adequate does not mitigate against the fact that the repairs were necessary. The specific amounts incurred for

new mains are contained in the items hereinbefore set forth, so I will not take the space to call the court's attention to it other than to refer to the classification.

Opposing counsel may make the claim, as, indeed, they did at the trial court below, that all of these expenditures for new service connections should be classed as extensions. However, I do not see any merit in that contention. Such a position would necessarily imply that every time the corporation exercised its corporate function it would be making an extension to its plant. Naturally the purchase of anything new would presumptively be an addition to the assets of the company, but all of such purchases cannot be classed as extensions, as that word is applied in cases of this character. Service connections, as before stated, are merely means of delivering the corporation's product and, as a matter of fact, constitute no value except as the same is used by a purchaser of water. To state a case analogous: If A builds a factory along the line of a railway company and the company, in order to get the freight, puts in a sidetrack and switch for the accommodation of the factory, you could not call such a spur or sidetrack an extension or a permanent improvement. If A's company dies, the sidetrack and switch are useless. It can be classed as nothing other than an operating expense.

II.

Did the intervenor sell the merchandise claimed for in reliance that it would be paid out of the current earnings of the corporation?

It seems that the above question must be answered in the affirmative in order for claims of this character to be allowed. It has not, however, been held by the authorities to be necessary to show this affirmatively. The manner of furnishing the goods, the amounts in which they are furnished, are features that have been taken into consideration in determining this point. The fact that the furnishing of these goods extended over a considerable period of time would not only imply that they were purchased for current necessities, but that it was intended that they were to be paid out of the current earnings. Also the fact that notes were subsequently taken for a portion of the amount, payable in installments at future dates, is a strong indication that it was the intention of the parties that the goods were to be paid out of the current income. I do not anticipate that any contention will be made on this point by opposing counsel. However, in proof that the manner of furnishing the goods, and the manner of payment is decisive on the proposition, I will quote from the case of *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 235:

“That whether a debt was contracted upon the personal credit of the company without any reference to its receipts is to be determined in

each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction.”

In the above quoted case the claim was for something over \$100,000, demanded from time to time. Finally notes were given for the balance due, payable at future dates. An inspection of the case will show that the situation is quite similar to the one at bar, and clearly establishes the fact that Crane Company is well within the rule.

III.

After a diversion of the current income has been shown, are creditors whose claims come within the designated class entitled to preference, regardless of time, provided they are within the period of the statute of limitations?

I answer the above query in the affirmative. The theory of allowance is that through diversion the secured creditors or bondholders have come into possession of moneys which in reality belong to the current creditors. In other words, the income of the corporation is a sort of trust fund for the benefit of the unsecured creditors. By allowing priority after a diversion has been shown, the court in effect requires the secured creditors to release this trust fund or to pay back into the fund that which they have surreptitiously withdrawn.

In the case of *Moore v. Donahoo*, 217 Fed. Rep. 184, the court held that the current income was a

trust fund for the benefit of the creditors, the exact language of the opinion being as follows:

“If, as is thus held, the current income constitutes a trust fund, and if the mortgagee in taking his security impliedly agrees that laborers and materialmen may first be paid out of this fund before he has any claim thereto, and if one performs labor or supplies material in reliance upon this understanding, it follows, as a matter of course, that he has a right which a court of equity may assist him to enforce, or if he so desires to institute a proceeding for that purpose.”

To a similar import is the case of *Union Trust Co. v. Walker*, 107 U. S. 596:

“As we have said in *Fosdick v. Schall*, 99 U. S. 235, these creditors are paid, not because in law they have a lien on the mortgaged property or income, but because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent before any income arises which ought to be applied to the discharge of the mortgage debt.”

Therefore, if, as it seems to be conceded, the current income is a trust fund for the benefit of current creditors, there is no good reason why creditors should be estopped from asserting their right to it short of the period of limitations. To apply arbitrarily a six-months' or one-year rule is manifestly unfair. The statute of limitations should be the only just barrier. While that is arbitrary purely,

yet it is statutory law and is notice to all dealing with relation to it. It seems plain to me that the court must either recede from the position taken, that the current income is a trust fund for the benefit of current creditors, or from the position that claims accruing prior to six months before receivership are barred.

If the current income ought first to be applied to the payment of current creditors, and if the mortgagee impliedly agrees that that may be done, how in a court of equity can the mortgagee justify the retention?

In the case of *Bellingham Bay Imp. Co. v. F. & N. W. Ry. Co.*, 49 Pac. Rep. 514 (Wash.) it was urged that inasmuch as the claims sought to be preferred were beyond the six-months' period, they were not allowable. In discussing that feature of the case, the court said:

“* * * It would seem but just that a party should, in the absence of special circumstances of controlling importance, be entitled to equitable relief for the full period in which, according to the statute, an action might be maintained at law to enforce the demand. If the lapse of three years is necessary, under the statute, to bar the debt, there appears to be no sufficient reason, generally speaking, why the equitable right should be barred within a shorter period.”

This appears to be logic, as well as equity.

Another equitable feature creeps into the discussions, which the court should not be unmindful of,

and that is the bondholders are here seeking equitable relief. They asked and received at the hands of the court, in fact, extraordinary equitable relief in the appointment of a receiver. After coming into equity they ought not to be permitted to take the position that they can enforce their security and at the same time retain from the current income moneys which they had no right in the first instance to take. I cannot see how their position can be tenable, unless we are to ignore the maxim that "he who seeks equity must do equity." Therefore, I say that by application of the well-established principles of equity, as well as the theory of allowance, the court cannot escape the conclusion that in meting out to the plaintiff the equitable relief which it prays for, the court should at the same time compel the plaintiff to do equity by returning the funds wrongfully diverted.

In most cases where claims have been denied because of time, no other equities favorable to intervenor were presented. A diversion creates an equity most favorable to intervenor, as has been often held.

The case of *Clark v. Central Ry. & Banking Co.*, 66 Fed. Rep. 806, is typical, holding:

"In this case the equities are especially favorable to the intervenors, for it appears that there was a diversion of the income for the payment of interest on bonds."

In all cases that I have reviewed where the other equities have been favorable to intervenor the question of time has been absolutely ignored.

Morrison v. Trust Co., supra.

Burnham v. Bowen, supra.

IV.

What constitutes a diversion of the income, and did diversion take place?

There was no contention made in the court below and I do not think any contention will be made here that there was no diversion. In fact, by the stipulation it was agreed, in substance, that there had been a diversion, in that the interest on the bonded debt had been paid out of the current income. (Trans. of Rec., p. 57.) By reference to the amount of the interest payable, it will be seen that diversions in this case did occur to the amount of nearly \$100,000 per year during the time that Crane Company's account accrued. That the paying of interest on bonded debt is a diversion is well established by the authorities, and needs no discussion. In addition to this diversion, it is apparent from an inspection of the receiver's reports that the company's plant at some points in Washington and at Hillsboro, Oregon, was a paying investment. That is, as far as the water end of the business was concerned. These earnings were made possible, to a large extent, by the materials furnished by Crane Company. As before stated, I do not feel that there will be any contention made on this point, and I will therefore waive any further discussion, at least until the correctness of this assumption is challenged. However, the

cases cited in my Points and Authorities under this heading conclusively establish the proposition.

V.

How should the income of a receivership be used, and how was it used?

What has just previously been said about income prior to receivership is equally true as to income during receivership. If at the instance of the mortgage creditors a receiver is appointed, the receiver is bound to use the income of the receivership in the manner the corporation would have been bound to use it. In other words, the appointment of the receiver does not give the mortgagee the right to misappropriate the current earnings, and if these current earnings are misappropriated in the manner hereinbefore stated, the corpus of the estate is chargeable with the restoration of the funds. This proposition is uniformly held to by all of the leading authorities.

In *Burnham v. Bowen*, 111 U. S. 780, is found:

“When a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession; that is to say, pay out of what is received from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings.”

Further quoting from the case, page 782:

“So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular.”

Substantiating this proposition are the later cases of *Gregg v. Metropolitan Trust Co.*, 197 U. S. 182, and *International Trust Co. v. Townsend Brick Cont. Co.*, 95 Fed. Rep. 850, and *Hale v. Frost*, 99 U. S. 389.

The receiver's report shows a net income in the hands of the receiver, which he has collected, amounting to \$123,091.44 (see stipulation of facts, Trans. of Rec., p. 79). If, as these authorities state, a receiver should use the fund as the corporation would have, and should have, used it, had a receiver not been appointed, he cannot escape the obligation of paying the notes representing Crane Company's claim, as they were made specific obligations, due and payable every thirty days until the total sum was paid.

Furthermore, considering the amount of the diversion, it is apparent but for that fact this obligation would have been paid. Therefore the court has the power to use this income to pay the obligations that should have been paid out of the current income.

As is stated in the case of *Fosdick v. Schall*, 99 U. S. 235:

“It is within the power of the court to use the income from the receivership to discharge obligations which, but for the diversion of the funds, would have been paid in the ordinary course of business.”

VI.

Within what time must claims accrue in order to be admitted to priority over secured creditors?

We come now to the most important phase of the discussion and the point that seems to have been decisive against the intervenor in the court below. To facilitate discussion of the subject, I will divide the intervenor's claims herein into different periods.

1. Within the six-months' period prior to receivership:

Exhibit “1”—June 24, 1914.....	\$26.80
Exhibit “2”—July 15, 1914.....	29.23
	<hr/>
	\$56.03

2. Goods furnished within fifteen months prior to receivership:

Exhibit “A-14”—April 18, 1913.....	\$ 149.66
Exhibit “A-15”—April 22, 1913.....	127.03
Exhibit “A-16”—May 1, 1913.....	53.44
Exhibit “A-17”—May 3, 1913.....	302.25
Exhibit “A-18”—May 9, 1913.....	45.90
Exhibit “A-19”—May 10, 1913.....	300.08
Exhibit “A-20”—May 20, 1913.....	805.26

Exhibit "A-21"—June 12, 1913.....	25.20
Exhibit "A-22"—June 25, 1913.....	18.00
Exhibit "B-18"—May 22, 1913.....	16.95
Exhibit "C- 3"—May 1, 1913.....	42.84
Exhibit "C- 4"—May 1, 1913.....	111.24
Exhibit "C- 5"—May 1, 1913.....	173.89
Exhibit "C- 6"—May 12, 1913.....	57.85
Exhibit "C- 7"—May 22, 1913.....	551.11
Exhibit "C- 8"—June 27, 1913.....	78.59
Exhibit "D- 5"—April 25, 1913.....	176.84
Exhibit "E- 3"—May 6, 1913.....	1.88
	<hr/>
	\$3,038.01

3. Goods furnished within two years and three months prior to receivership:

Exhibit "A- 2"—May 9, 1912.....	\$ 49.00
Exhibit "A- 3"—May 11, 1912.....	95.72
Exhibit "A- 4"—May 20, 1912.....	30.79
Exhibit "A- 4"—May 20, 1912.....	21.31
Exhibit "A- 4"—May 20, 1912.....	21.87
Exhibit "A- 4"—May 20, 1912.....	48.75
Exhibit "A- 4"—May 20, 1912.....	36.25
Exhibit "A- 4"—May 20, 1912.....	164.03
Exhibit "A- 5"—May 24, 1912.....	63.82
Exhibit "A- 6"—June 19, 1912.....	1,868.70
Exhibit "A- 7"—June 19, 1912.....	176.80
Exhibit "A- 8"—June 25, 1912.....	110.87
Exhibit "A- 9"—July 1, 1912.....	9.10
Exhibit "A-11"—July 16, 1912.....	110.14
Exhibit "A-10"—July 10, 1912.....	45.00
Exhibit "A-12"—July 17, 1912.....	13.16

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Exhibit "A-13"—July 23, 1912.....	85.50
Exhibit "B- 9"—June 4, 1912.....	38.29
Exhibit "B- 8"—June 26, 1912.....	168.55
Exhibit "B-11"—June 26, 1912.....	1,680.04
Exhibit "B-13"—July 1, 1912.....	28.50
Exhibit "B-14"—July 1, 1912.....	28.50
Exhibit "B-15"—July 1, 1912.....	33.95
Exhibit "B-16"—July 1, 1912.....	18.30
Exhibit "B-10"—July 12, 1912.....	79.58
Exhibit "B-12"—July 16, 1912.....	561.91
Exhibit "B- 3"—July 20, 1912.....	66.78
Exhibit "B-16"—July 23, 1912.....	392.40
Exhibit "B- 4"—July 29, 1912.....	116.41
Exhibit "B- 2"—July 30, 1912.....	15.39
Exhibit "B- 1"—July 30, 1912.....	41.76
Exhibit "B-17"—August 1, 1912.....	28.55
Exhibit "B- 5"—August 5, 1912.....	17.10
Exhibit "C- 1"—May 20, 1912.....	130.41
Exhibit "C- 2"—June 19, 1912.....	535.28
Exhibit "D- 1"—May 14, 1912.....	43.44
Exhibit "D- 2"—May 17, 1912.....	356.70
Exhibit "D- 3"—May 20, 1912.....	171.36
Exhibit "D- 4"—June 13, 1912.....	222.18
Exhibit "E- 1"—May 17, 1912.....	41.72
Exhibit "E- 2"—July 16, 1912.....	186.36
	<hr/>
	\$7,944.29

4. Goods furnished within three years:

Exhibit "A-1"—August 14, 1911.....	\$58.23
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5. Goods furnished within three years and three months :

Exhibit "B-7"—May 10, 1911.....\$195.89

Again let me call the court's attention to the repeated injunctions in the authorities that each case must be decided, to a large extent, upon its own peculiar facts and equities. There has been no hard and fast rule establishing the time within which claims can be allowed. There is no statutory limitation, and in the absence of a statutory limitation, it is obvious that there can be no rule binding upon this court or upon any court, in fact. The six-months' rule which was invoked and applied by the trial court has never been adopted in any jurisdiction, and particularly not in this jurisdiction. Furthermore, it is generally applied, as I will show, where in the appointment of a receiver a specific provision is put in to that effect. In fact, the six-months' rule arose out of an order of that kind.

As is stated in Foster's Federal Practice (5th ed.), Volume 1, Section 305, page 962 :

"The practice arose in the Seventh Circuit to impose as a condition upon the appointment of a receiver in a suit for the foreclosure of a railroad mortgage, that debts for materials and supplies and labor furnished to the mortgagor within six previous months be paid out of the net income, or in some cases out of the proceeds of the sale of the road, before the debt secured by the mortgage. This is called the six-months' rule."

The cases are so numerous that it would be impractical and unnecessary to review many, but I will refer to what I consider the principal authorities on the question and out of which this doctrine grew, and through which it is promulgated:

Farmers' Loan & Trust Co. v. Ry., 53 Fed. Rep. 187:

"There is no fixed rule barring preferential debts contracted more than six months before the appointment of a receiver. There is no six-months' rule."

Railroad Co. v. Lamont, 69 Fed. Rep. 23:

"A preferential claim is not barred though contracted more than six months before the appointment of a receiver. As to such debts there is no six-months' rule, as has often been decided."

Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 285:

"In some cases the courts in their administration of railway properties by receivers have refused to give priority to unsecured claims that did not accrue within the six months immediately preceding the appointment of a receiver. Such a rule will do full justice in most cases to creditors who are to look to current receipts for current debts, but no absolute rule on the subject has been prescribed by statute or judicial opinion. A claim accruing back of the six-months' period immediately preceding the receivership may, under the circumstances of the particular case, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period."

Perhaps there can be no more convincing argument to show that there has never been a hard and fast rule established than to cite some cases where claims have been allowed for periods greater than six months.

1. In the case of *Skiddy v. Atlantic*, 3 Hughes, 320, a claim was allowed that had accrued eight months prior to the receivership.

2. In the case of *So. Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 257, and *Burnham v. Bowen*, 111 U. S. 776, claims were allowed that had accrued eleven months prior to the receivership.

3. In the case of *Farmers' Loan & Trust Co. v. Ry.*, 53 Fed. Rep. 182, and *Central Trust Co. v. Ry.*, 41 Fed. Rep. 551, claims were allowed that had accrued two years prior to the receivership.

4. In the case of *N. Y. Guaranty & Indemnity Co. v. Tacoma Rd.*, 83 Fed. Rep. 365, a claim was allowed that had accrued twenty-two months prior to the receivership. This case arose and was decided in this jurisdiction.

5. In the case of *Hale v. Frost*, 99 U. S. 389, a claim was allowed that had accrued three years prior to the receivership.

6. In the case of *Trust Co. v. Morrison*, 125 U. S. 591, a claim was allowed as preferred, a part of which had accrued more than six years prior to receivership.

Some of the above decisions I will review, in order to show the court's reasoning in allowing the claims.

In the case of *Southern Ry. v. Carnegie Steel Co.*, *supra*, the court allowed the claim as preferred, notwithstanding that the order appointing the receiver contained the usual six-months' clause. Part of the materials for which they were claiming went to the construction of a new line of road. Furthermore, about three or four months prior to the appointment of the receiver the claim of Carnegie Steel Company was reduced to the form of notes, made payable at future dates, very similar to the case at bar.

In holding upon the question that the court was not bound by the six-months' rule, and in deciding the claim in favor of the intervenor, the court stated as follows, page 285:

"It may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee, when accepting his security, impliedly agrees that the current funds of a railroad company, contracted in the ordinary course of business, shall be paid out of the current receipts before he has any claim upon such income."

It will be seen that here the court absolutely disregards the question of time, in spite of the fact that in the order appointing the receiver the six-months' clause was added. The equities which permitted the court to allow the claims in that case were very similar to the facts presented here, and we commend this case particularly to a careful reading by the court.

In the case of *Farmers' Loan & Trust Co. v. K. C., W. & N. W. Ry. Co.*, 53 Fed. Rep. 187, Judge Caldwell, in the opinion, quotes from the case of the *Central Trust Co. v. St. Louis, W. A. & T. Ry. Co.*, 41 Fed. Rep. 551, where preferred claims were allowed extending over a period of two years prior to the receivership, and where Justice Brewer said:

“I do not understand from the parties making the application for the receiver that there was any desire or thought of cutting off any just claims accruing *during the brief period* which elapsed since their mortgage was given, and if counsel or party had any such idea they much mistake my judgment in the premises.”

This is strong language. In other words, Justice Brewer calls two years a “brief period,” and clearly indicates what I have heretofore contended, that claims that have an equitable character should not be arbitrarily barred by the application of any six-months’, eight-months’, or any other rule.

In *Trust Co. v. Morrison, supra*, the equities of an intervening petitioner were thoroughly discussed. Here it appears that an execution was sued out and the property of the railroad company levied upon. The railway company filed a bill for an injunction and were compelled to put up a bond. This bond was furnished by Morrison. Subsequently the railway company were defeated, and Morrison became liable, and after considerable litigation, paid a considerable amount, as I remember, about \$12,000, in satisfaction of the judgment. The case

is a very interesting one and touches most of the points upon which these cases are decided.

It will be noted, furthermore, that the time question is absolutely ignored by the court. The facts of the case were inquired into, and it was decided squarely upon the equities, regardless of time.

No time limit was discussed, but looking at the case from an equitable standpoint, the court saw that Morrison had come forth at a time when the property of the corporation was in peril and rescued it. This inured to the benefit of the bondholders. Applying the same equity to this case, we find that Crane Company, in Vancouver and also in Hillsboro, came forth at a time when the company was in danger of losing its franchises, when its property had become debilitated, when it was necessary to make extensions, lay new mains and otherwise comply with its franchises and secure renewals which were essential to the preservation of its property, and the properties covered by the mortgage, and rescued this property from "peril of abstraction," and by reason thereof Crane Company's money has gone into the pockets of the mortgage bondholders. In fact, Crane Company literally converted a security which was admittedly valueless into properties worth thousands of dollars. Furthermore, to magnify the inequity and add a grim irony to the situation, the mortgage bondholders were, during this time, taking and receiving money from the corporation that, under all of the authorities, equitably be-

longed to Crane Company. If, as the authorities seem to hold, this doctrine rests on the consideration of equitable principles, what possible equitable consideration would justify such a holding? To our mind it would be shocking to the most common principles of equity to allow them to reap the benefits of the materials which Crane Company have put into their properties without compensating them therefor. In the receiver's report filed herein it will be found that the estimated value of its properties is given in such an amount as to clearly indicate that what Crane Company put in increased the value of the properties more than tenfold.

Take, again, the case of *Burnham v. Bowen*, 111 U. S. 783, where claims were allowed that had accrued eleven months prior to the receivership. The court again ignores the question of time, deciding the case upon the proposition:

“That if current earnings are used for the benefit of mortgage creditors, before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.”

It does not in any of the cases that I have reviewed consider time as one of the equitable essentials necessary to the allowing of claims. One of the latest cases, for instance, in which the six-months' rule is mentioned is *Gregg v. Metropolitan Trust Co.*, 197 U. S. 107.

The court stated that no question of diversion was raised. The only thing to be decided was as to whether the intervenors were entitled to priority out of the corpus of the estate. Some reason for such a decision, because the bondholders did not visibly and materially benefit by the materials furnished, neither did they take what in equity belonged to the current creditors.

Here we have the admitted facts that the bondholders, in addition to getting the benefit of the materials which Crane Company have put in, took from the corporation money which should have gone to Crane Company, and which would have been sufficient to more than pay Crane Company's claim. If, as is stated in the cases hereinbefore cited, this income constitutes a trust fund for the benefit of the current creditors, there is no reason why the elapse of a year or two should foreclose the creditors, or give the mortgage bondholders the right to retain what does not belong to them.

In the case of *N. Y., G. & I. Co. v. Tacoma Ry. & Motor*, 83 Fed. Rep. 367, a cable had been furnished to the railway company more than twenty-six months prior to the date of the receivership. A diversion was shown in the case, and in deciding that the intervenor was entitled to priority and in passing upon the question of time, the court stated as follows:

"Nor can it be said that there is a fixed arbitrary rule barring preferential claims that have been contracted more than six months be-

fore the appointment of a receiver. In *Railroad Co. v. Lamont*, *supra*, it was said 'a preferential debt is not barred, though contracted more than six months before the appointment of a receiver. As to such debts, there is no arbitrary six-months' rule, as has often been decided.' In the case cited the indebtedness accrued more than six months before the receivership. In *Atkins v. Railroad*, 3 Hughes, 307 (Fed. Cas. No. 604), the claim was twenty-two months' old at the time of the appointment of the receiver. In the case of *Hale v. Frost*, 99 U. S. 389, the Supreme Court gave priority to a claim for materials furnished three years before the appointment of a receiver, and for which a note had been given sixteen months before the receiver was appointed. In *Burnham v. Bowen*, 111 U. S. 776, priority was given to a claim for coal supplied eleven months before the appointment of a receiver. In *Trust Co. v. Morrison*, *supra*, a liability incurred by the intervenor as surety for a railroad company on an injunction bond to stay the execution of a judgment at law against the company, executed more than six years before the date of the filing of the petition in intervention, was held a preferential claim. See, also, *Douglass v. Cline*, 12 Buch. 608; *Skiddy v. Railroad Co.*, 3 Hughes, 320 (Fed. Cas. No. 12,922); *Williamson Administrators v. Railroad*, 33 Grat. 624. In the case at bar the cable was delivered on September 17, 1892, and was placed in use on October 24 of the same year. The defendant motor company was solvent until December 20, 1894, and on December 24 of that year a

receiver was appointed by the state court to take possession and charge of the property of the company. The time that elapsed between the delivery of the cable and the appointment of the receiver by the state court would, therefore be about twenty-six months, or a little over two years."

The Supreme Court of the State of Washington has passed upon the question in a very interesting and exhaustive case, viz.:

Bellingham Bay Improvement Co. v. Fairhaven & N. W. Ry. Co., et al., 49 Pac. Rep. 514.

In this case the intervenor's right of action was for labor, supplies and materials furnished the railway company between *January, 1892*, and *August, 1893*. The receiver was appointed *February 1, 1896*. The attorneys for the receiver demurred to the complaint, one of the grounds of demurrer being that the intervenor had lost by laches any equity for preference over the mortgaged debt. The court, in passing upon the subject, reviewed a number of the federal cases, and as that portion of the opinion is brief, I quote it verbatim:

"We think it is correctly stated that the length of delay in asserting one's rights which will amount to laches is not subject to fixed rule, but is largely dependent upon circumstances. The usual course of the company in the conduct of its affairs, its financial circumstances and ability to make payment, as well as the course of dealing between the parties,

must be considered in determining to what extent credit for claims of this character may be permitted to run back. In *Hale v. Frost*, 99 U. S. 389, the Supreme Court of the United States gave priority to a claim for material furnished three years before the appointment of a receiver. In *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, the same court gave preference to a claim for supplies furnished more than eleven months prior to the appointment of a receiver; and in *Farmers' L. & T. Co. v. Kansas City, W. & N. W. Ry. Co.*, 53 Fed. 182, it is said: 'There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver. *There is no six-months' rule.*' And the court further says that what length of time will bar them is not clear upon the authorities, 'and depends largely upon the circumstances of each particular case.' Upon principle, it would seem but just that a party should, in the absence of special circumstances of controlling importance, be entitled to equitable relief for the *full period in which, according to the statute, an action might be maintained at law to enforce the demand. If the lapse of three years is necessary, under the statute, to bar the debt, there appears to be no sufficient reason, generally speaking, why the equitable right should be barred within a shorter period.*"

It would seem that the portion in italics is especially fitting to the case under discussion. If, as the authorities which I have previously reviewed conclusively establish, the current income is a trust fund for current creditors, and that through a diver-

sion the bondholders have inequitably come into possession of funds which do not belong to them, there is no reason why their obligation to return it should be impaired within the statute of limitations. Another significant fact in the case above quoted is, that the allowance was made from the corpus of the estate, as there was no diversion shown.

There will, no doubt, be authorities cited by counsel tending to show that there is a six-months' rule in effect. However, a close inspection of the cases will reveal the fact that the application of a six-months' rule, or any other rule, is purely arbitrary, and applies solely to the particular facts under discussion, and in most instances where no diversion of current income is shown. It will readily be seen that a case where no diversion has been shown should be tested by entirely different equity than one where a diversion is admitted. There are also cases where the six-months' rule was applied, owing to some state statute which had been followed by the Federal Court in the appointment of a receiver, and which provided for preferential claims accruing within the six-months' period prior to the receivership.

Such cases must be differentiated from the present case. In reading over the various cases where time has been a factor in the decisions I have noted particularly that the courts have always prefaced their holding by the affirmation that no six-months' rule existed, but as applied to the facts of the par-

ticular case, the six-months' time was ample. Other cases have been decided on a question of time where there were no other equities in favor of the intervenor; in fact, where the general equities were decidedly against them. Many decisions, each supported by the so-called "six-months' rule," arose in the Eighth Circuit, and for some reason or other Judge Sanborn's decisions are in direct conflict with other decisions of the Supreme and Federal Courts, because of the technical rules he applied, apparently for the benefit of the bondholders and mortgagees. It is impossible to harmonize all of the judicial utterances and conclusions set forth in the different cases decided by the Supreme Court. Some cases are decided absolutely opposed, yet to find a differentiating point is difficult. It is not surprising that the law should be in the uncertain condition in which we find it when we consider that the doctrine is not based upon any written law, but upon equitable principles which always lie within the sound judicial discretion of the chancellor having due regard for the equities of the particular case. So in the last analysis each case must be considered from its own peculiar angle, and the court in arriving at its conclusion is directed only by certain guide posts which were set early in the history of equitable jurisprudence, and which have become fundamental law.

VII.

What are the equities peculiar to intervenor's claim?

With the foregoing in mind, let me take the court over the peculiar facts in this case, with a view and purpose of showing, if possible, the equities that should appeal to the court in the decision of this case.

The materials which were furnished by Crane Co. went into and formed a part of the mortgaged security. Not only greatly enhancing the value thereof but in many instances actually reviving security that had become valueless. For instance, the Hillsboro plant. Crane Co. put into this approximately \$5,000 worth of material. At the time this was furnished the franchise under which the company was operating was about to expire and its renewal was conditioned upon the replacement of the old mains and certain extensions, materials for which were furnished by Crane Co.

In Vancouver a similar condition existed where Crane Co. furnished goods to the amount of approximately \$5,000. These very properties have now gone, or will go under a foreclosure sale, into the possession of the bondholders.

If they would pay to Crane Co. what the materials cost, they would then be in a position far better than had the intervenor not come to the rescue. In addition to this while these materials were being furnished the bondholders absolutely took sufficient

from the current funds of the corporation to have paid Crane Co. in full. In other words, while Crane Co. was putting materials into the corpus of the estate for the betterment and preservation of the property, which enured to the benefit of the bondholders, the bondholders in turn were reaching into the pockets of the corporation and taking money which in equity and good conscience belonged to the intervenor. This fact we want to emphasize, that the diversion during the time that this account was accruing was so flagrant as to almost impute bad faith to the bondholders. Coming into court as they have asking equitable relief, they ought to be subjected to the wholesome doctrine that he who seeks equity must do equity, and be compelled to turn back what should have long ago been paid to the current creditors. We do not think that the doctrine of laches, disregarding the equities above stated, could be or should be urged against Crane Co. They accepted from time to time payments on account in such sums as the Washington-Oregon Corporation declared its ability to make, (Trans. of Rec., p. 55), supposing that the current receipts were being exhausted in the payment of current bills. Neither can Crane Co. be placed in the same category as labor claims or material men who have furnished materials that were used neither leaving or making any visible addition to the property. Here the materials of the intervenor can actually be identified in each instance, and are invoiced and inventoried at the present time as part of the corpus of the mortgaged

estate, and are being used by the receiver in continuing the business of the corporation and in the earning of its dividends.

The court below in its opinion attempted to differentiate the case of the *N. Y. Guaranty & Ind. Co. v. Tacoma Ry. & M. Co.*, 83 Fed. Rep. 367, by stating that the amount of the intervenor's claim was not definitely ascertained until approximately six months prior to the receivership. In answer to that I might urge with equal propriety that the intervenor's claim herein was not definitely ascertained until the execution of the notes in June, 1914, less than sixty days prior to the receivership. (Trans. of Record, p. 52.)

As opposed to these equities the appellees stand in the position of admitting all of them yet seeking to avoid their application by applying technical rules announced in decisions wherein the facts have no similarity.

For instance, in the case of *Ill. Trust & Savings Bank v. Doud*, 105 Fed. Rep. 123, a case referred to and urged with much force by counsel for the appellee, the claim there disallowed was for money borrowed that was used in the construction of a building for the purpose of engaging in an entirely new enterprise. Furthermore the man who loaned the money was the owner of the majority of the capital stock and agreed in the terms of the loan that he should not be paid out of the current revenue, until other indebtedness was paid. Could Crane Co.'s position be compared to Doud? To have given Doud

a preference would have been an injustice and would have permitted him to openly violate a specific agreement to the contrary. Any reasoning that the court may have given in this case certainly can furnish no precedent for a decision here. *Furthermore, there was no diversion of the current income in that case.* Another case urged with emphasis is that of *Roger Ballast Car Co. v. Omaha, etc., Ry.*, 154 Fed. Rep. 629. The claim there was for ballast cars furnished to this road for the purpose of ballasting. *No diversion was shown.* The ballasting might have been necessary, but to buy a large quantity of ballast cars for that purpose could not be considered an operating expense. If, as the authorities seem to hold, each case must be decided upon its own facts, this can furnish no precedent for the decision of Crane Co.'s equities. In the case of *Toledo v. Hamilton Ry.*, 134 U. S. 296, which is cited very frequently in opposition to an allowance of preferred claims, the facts and the argument wholly prove the merit of our contention. There the claim was for furnishing materials to build a dock, which was entirely new, and which was not necessary to the operation of the road, and was so held. It is obviously impossible for me to anticipate the citations of opposing counsel or to attempt to review the decisions which seem to be contrary to my contention. I do desire, however, to impress fully upon the court that the reasoning of each case must be taken with its facts. You cannot in other words expect a case where no diversion is shown to furnish a criterion for the decision

here. Neither can a case be selected as governing where the materials furnished are entirely collateral to the main business of the corporation and not a part of maintenance or operating expense, or necessary for the preservation of the properties. Neither can a case be selected where the equities are otherwise against the intervenor, such as in the Doud case. I have been able to find no case where all of the essential elements seem to be present, and where the equities of the intervenor are as strong as in the case at bar, and if the court will take the underlying theory of preferable allowances and apply it to the facts in this case, I feel confident that the result must be an allowance of the intervenor's claim.

VIII.

Character of public service corporation to which doctrine of equitable preference applies.

Opposing counsel will make the contention no doubt that this doctrine does not apply to public service corporations of the character of the defendant. In fact, the learned judge of the District Court took occasion to express his doubt as to whether or not it did apply. The reason being that he could find no authority of the United States Supreme Court establishing such a precedent. It is my contention that the doctrine undoubtedly applies to all public service corporations. The same theory underlies all public service corporations, namely, the public necessity of keeping such corporations in operation. I am unable to perceive any greater necessity

for maintaining a railway as a going concern for the benefit of the public than maintaining any other form of public service corporation. They all owe a duty to the public, and public health and safety oftentimes depends as much upon the countenance of these corporations as the continuance of a railroad. Take the defendant corporation, for instance. It had a public duty to furnish water, a necessity to the inhabitants of the several towns in which it operated. If the health, safety and continuance of the public would not demand the continuance of such a corporation even to a greater extent than the maintenance of a railroad, then the line of demarkation is altogether too finely drawn to insure substantial justice or establish a uniform doctrine. The doctrine originated in connection with a steam railroad, and if it is to apply to steam railroads only, then this doctrine will go out of existence when steam railroads vanish, which they surely must within the next decade. Usually in the application of any equitable principle the court addresses itself to the theory and substance rather than to the form, and looking at the theory there can be no distinction between the two classes of cases. However, the question should not arise here for the reason that all of these plants, including the water, gas, railway, etc., were operated as a single unit, and under one name, so literally speaking the defendant was engaged in the operation of a railroad. The fact that it was in the additional business of furnishing water would not take it without the rule, if we are looking simply at the form.

While it must be conceded that this doctrine has been applied usually to railroad corporations, yet I can find no case where the courts have refused to apply it to other forms of corporations for that reason. In fact there are a number of cases where it has been so applied.

In the case of *Illinois Trust & Savings Bank v. O. E. Ry.*, 89 Federal Reporter, 235, it was applied to a concern engaged in operating electric railways, electric light and steam heating plants.

In the case of *Reyburn v. Consumers Gas, Fuel & Light Co.*, 29 Federal Reporter, 563, the court in applying the principle to the gas company stated the doctrine as follows:

“The doctrine of *Fosdick v. Schall*, and the subsequent cases on the same question is, that for the purpose of keeping *works of a public character* within which the *works of this company* may properly be included in operation, those who have given the company credit for supplies, necessary to keep the works in operation (operating supplies) are to have a lien, etc.”

In the case of *U. S. Investment Corporation, et al. v. Portland Hospital*, 40 Oregon Report. 523; 67 Pacific Reporter, 195; 56 L. R. A. 627, the doctrine is interpreted by Judge Bean, as follows:

“Where a court of chancery takes possession of a railroad or other similar property of public corporations and operates the same through a receiver, debts contracted for labor, supplies and other necessary purposes both before as well as

after the appointment of the receiver, may be made a first lien upon the income, and if that is not adequate, upon the corpus of the property, but this is an extraordinary power exercised only in cases of railroads or other like corporations of quasi public character charged with a public duty and for reasons peculiar to that character of property."

In the case of *Homer v. Baltimore Refrigerating & Heating Co.*, 117 Maryland, 411; 84 Atlantic Reporter, 176, the doctrine was applied to a refrigerating and heating company.

In the case of *Reinhart v. Augusta M. & I. Co.*, 94 Federal Reporter, 901, the doctrine was applied to a mine.

In the case of *Ellis v. Vernon Lighting & Water Co.*, 86 Texas, 109, the doctrine was applied to a water company.

In the case of *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Federal Reporter, 39, the doctrine was applied to a water company.

Counsel at the hearing in the lower court stated that in the case of *Wood v. Guaranty Trust Co.*, 128 U. S. 411, it was held that the authorities have applied the doctrine to railroad corporations only. I state with emphasis that this case does not establish any ground for such a statement. It merely in passing calls attention to the fact that the doctrine had not so far been applied except in the case of railroad companies.

The case of *Reyburn v. Consumers Gas, Fuel & Light Co.*, *supra*, to my mind touches the key note,

and that is that creditors who have given credit to the company for operating expenses and supplies for the purpose of keeping "works of a public character" in operation are entitled to a prior lien upon the current income of the corporation. Therefore I say that to take the position that the doctrine which arose and grew out of the much discussed and interpreted case of *Fosdick v. Schall* should not be enlarged so as to include all public service corporations, is to admit that the theory of the doctrine is wrong. I feel confident that this court cannot escape the conclusion, that if the intervenor herein is otherwise entitled to a preference, this corporation is clearly within the class to which the doctrine would be applicable.

In conclusion, I submit that inasmuch as this whole doctrine arose out of and is founded upon equitable principles and inasmuch as the application of the rule which has been evolved from the case of *Fosdick v. Schall* lies largely within the sound discretion of the chancellor, Crane Co.'s equities herein are such that in view of all of the circumstances entitles it to the equitable relief prayed for. I submit therefor that the decree of the District Court is erroneous and should be reversed, and that a decree should be entered in this court establishing the preference of the intervenor in the amount hereinbefore stated.

Respectfully submitted,

MAURICE W. SEITZ,
Solicitor for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation,
Appellant,
vs.

FIDELITY TRUST COMPANY, Trustee,
a Corporation, and WASHINGTON-
OREGON CORPORATION, INDEPEND-
ENT ELECTRIC COMPANY, a Cor-
poration, and WILLIS D. HOAG,
Appellees.

No. 2768

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASH-
INGTON, SOUTHERN DIVISION

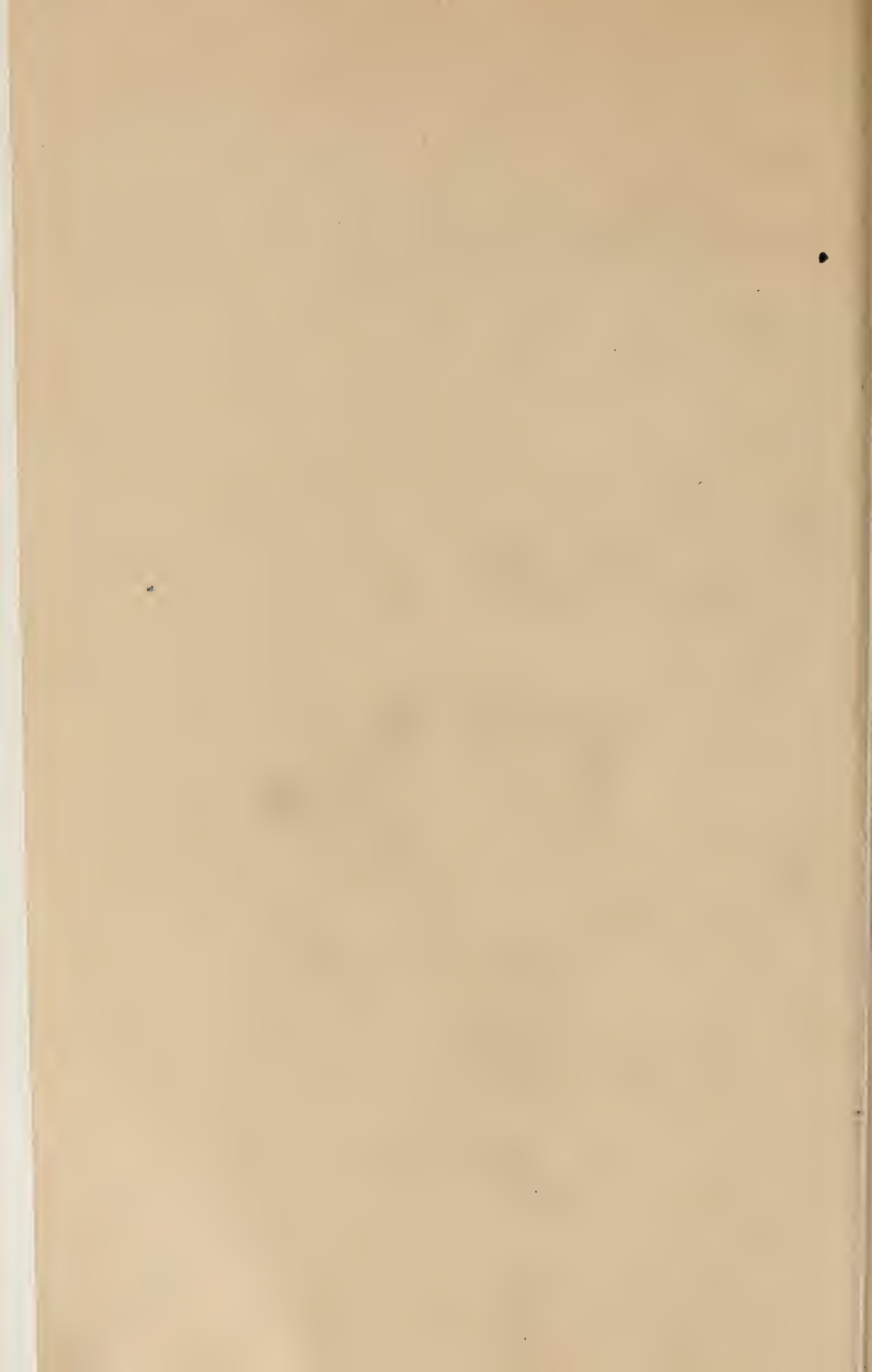
BRIEF OF FIDELITY TRUST COMPANY,
TRUSTEE, AND OF THE TEMPORARY RE-
CEIVER OF WASHINGTON - OREGON
CORPORTATION, IN OPPOSITION
TO THE CLAIM OF APPEL-
LANT FOR PRIORITY.

MAURICE W. SEITZ,
Solicitor for Appellant.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
F. D. METZGER,

Solicitors for Appellee.

E. M. HAYDEN,
of Counsel for Appellee.



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THE FACTS

Crane Company, from time to time between January 1st, 1911, and May 31st, 1914, sold pipes, fittings and gas and water equipment to the Washington-Oregon Corporation, which was during such period engaged in the operation of electric railway systems, light and water systems in the states of Washington and Oregon.

In May, 1911, and before any of the account of Crane Company involved in this litigation arose, the Washington-Oregon Corporation, which had been doing business for only a few months, executed a mortgage or deed of trust to Fidelity Trust Company, as trustee, to secure an authorized bond issue of Washington-Oregon Corporation to the amount of \$5,000,000.00, said bonds being 6 per cent bonds, and the interest maturing on the first of April and the first of November in each year. Said mortgage constituted a lien upon all property of every nature and description then owned by Washington-Oregon Cor-

poration and thereafter acquired by it, and upon the rents, issues and profits of all of such property. (Amended Bill of Complaint, Transcript p 3) (All of the allegations of the amended bill of complaint in the foreclosure suit are made a part of Crane Company's Petition, Section VI.)

This mortgage was duly filed and recorded in the various counties of the states of Washington and Oregon where the Washington-Oregon Corporation owned property. (Amended Bill, par. 10.)

After the recording of this mortgage, and thus after all persons dealing with the Washington-Oregon Corporation were put upon notice of the prior lien of the holders of bonds issued under this mortgage, Crane Company continued to furnish materials to the Washington-Oregon Corporation. The materials thus furnished are mentioned in Schedule A, annexed to Crane Company's Amended Petition.

The purchase price of the materials furnished by Crane Company amounted to about \$100,000.00. Most of the materials furnished by Crane Company and all of the materials comprised in the present claim (with the exception of an item of \$195.89), were furnished subsequent to the recording of the Fidelity Trust Company mortgage. Washington-Oregon Corporation has paid to Crane Company in all the sum of \$89,871.24 on account of the total \$100,929.05 of materials furnished by Crane Company. (Amended Petition, Tr. 26.)

In some instances the parties agreed that payments made by Washington-Oregon Corporation should be applied on specific items which were not the oldest items. The balance of the account is \$11,202.70.

On June 1st, 1914, a balance of account was struck, and six notes were given for the unpaid balance in the principal sum of \$13,223.25; one of which was paid July 7, 1914, by the Washington-Oregon Corporation. This was about three weeks prior to the appointment of the receiver herein. (Amended Petition, Par. VIII, Tr. p 31.)

As shown by the Amended Petition the present claim of Crane Company is based upon materials furnished during the following periods prior to the appointment of the temporary receiver (July 31, 1914):

\$56.03 within 6 months prior to the receivership.
\$00000 in more than 6 months and within one year.

\$3,038.01 more than one year and within 18 months.

\$45.65 more than 18 months and within 2 years.

\$7,898.64 more than 2 years and within 2 years 6 months.

\$58.23 more than 2 years and 6 months and within 3 years.

\$195.89 more than 3 years and within 3 years and 3 months.

NATURE OF MATERIALS

APPELLANT'S CLASSIFICATION

In appellant's brief it divides the items of its claim into three groups, (1) materials furnished which were purchased and used for repairs and replacements; (2) materials which were purchased and used for making service connections; (3) materials which were purchased and used in making extensions and betterments and for the laying of new mains to take the place of old mains.

Before making a classification which we think would fit the facts, we desire to point out very briefly the inaccuracies of fact in the classification made by the appellant. The facts are not always fully or accurately stated in the brief, and reference should be made to the stipulation. (Tr. 51 and Exhibits.)

We first consider the items under the heading "1" of the brief. All of these items are claimed by appellant to constitute "repairs and replacements."

1. Exhibit 1 in the brief is apparently Exhibit 6 in the stipulation, and it is simply marked "Replacements." Exhibit 2 of the brief is apparently Exhibit 7 in the stipulation, and is simply marked "Service Connections." Exhibit A-3 and A-5 are stated in the stipulation to have gone into stock and to have been used for service connections; these are not repairs nor are they replacements. Exhibit A-4 was used for an extension to the S. P. & S. shops, to which reference is more fully made in the stipulation, and is more fully explained in our own classification; it is not a repair nor a replacement, and it is not known whether it was actually used. A-7, as shown in the stipulation, was designed for use "in connection with services from old mains or extensions of old mains." A-14, A-16, A-18 and A-22, were all items of *betterments* at the Springs. A-15 was definitely an item of *extension*, in order to tie up to City hydrants in connection with the contract with the City of Vancouver. B-4, B-8 and B-12 were items of replacements. B-18 was an item of repairs *and* service connections, but they are not segregated. Exhibits C-1 and C-2 are both for replacements. C-3 was a *betterment* made necessary in order to pump direct during the re-lining of the reservoir and were necessary

to permit the cleaning of the reservoir. C-4 was a *betterment* to prevent the shutting off of large residence districts in case of breaks on the 6-inch and 4-inch mains at Chehalis. C-6 was a *betterment* to promote the more economical operation of the water system at Chehalis. D-1, \$43.44, is shown to be for repair and maintenance of pipes at Centralia; and D-4, \$222.18, a part of the *building and installation of new mains* to take the place of old mains which were out of repair and leaking and a part of which were installed preparatory to hard-surfacing the streets, the old mains being inadequate to serve customers. The court will see, by an examination of the items of Subdivision 1, on pages 17 and 18, appellant's brief, that the items were not for repair but were *for replacing, the making of service connections, the making of betterments, and the making of extensions*—the latter being for the S. P. & S shops or to connect with the City hydrants.

As to many of the items in appellant's Subdivision 1 and in the subsequent subdivisions, it should be noted that they were put in stock, and the stipulation does not disclose, and it is not known whether they were used prior to the receivership or up to the present time.

2. As to Subdivision 2 of the appellant's classification, beginning on page 19, claimed to be for service connections, the following should be noted: The third item of Exhibit A-4 was used in connection with the S., P. & S. *extension*, and were, of course, extensions themselves. The same thing is true of item on the twentieth page of the brief \$154.03. Exhibit A-8 was used on "new or old mains," but they are not segregated. Exhibit A-10 was used in

connection with “new or old mains.” Exhibit A-13 was used for the S., P. & S. *extension*. Exhibit B-1 was put *in stock* for future connections. Exhibit B-3 was used in making service connections from *new mains* at the time the same were laid in order to eliminate future cost of taking up and replacing pavement. Exhibit B-9 was used for repairs, service extensions, making taps to new mains, at the time the same were laid, for future connections; they were deemed expedient to eliminate future cost of tearing up pavement and putting same in later. Exhibit B-10 was partly placed in stock, to be used on service connections, and the balance was used in replacing old with new pipe prior to paving. Exhibit C-5—the items were placed in stock and checked out for new service to customers, partly for old and partly for new mains; the same is true of Exhibit C-7, except that some portion of that was used to connect dead ends; the same is true of C-8, except that no part of it appears to have been used for connection of dead ends. Of all of these items, a very considerable part were placed in stock and, as stated in the stipulation, it is not known in many cases whether the items were actually used or not prior to the receivership, or since. (See Exhibits A-1, A-4, A-8, A-11) A large proportion of the items were actually used as stated for extensions. (A-8, A-17, A-19, and others.) Some of them were used for the S., P. & S. extension. (See A-4, 2nd and 5th items, A-13 and others.)

3. Apellant’s Subdivision 3, beginning at page 23, is “for materials used in laying and replacing old mains and in making betterments.” As to these items, we ask the Court to note, as of Exhibit A-6, that the whole item was for the S., P. & S. extension

and that the company had no pipes on this street at all. There was an old 1½-inch main on a part of this street belonging to somebody else, and apparently used by the corporation. This pipe only extended about seven hundred (700) feet. A new extension was put in by the company to reach the S., P. & S. Company's shops, and the item of \$1,868.78, being Exhibit A-6, was pipes for that extension. A-12 was used in connection with the same extension. A-20 was an extension to meet the City fire hydrants in accordance with the contract with the City; this was a distance of approximately seven hundred feet. The stipulation states that the entering into of this contract was a "condition precedent to the granting of the franchise," (Exhibit A, p. 6). This was *an extension*. The balance of the pipe was put into stock and was to be used in new mains. *It is not stated whether it was actually used or not.* B-11 is for "new mains in place of old mains," etc. B-13, 14, 15 and 16 were a part of the same improvement. Exhibits B-2, 5 and 17, were, as shown in the stipulation, used in connection with new mains. Exhibit B-6 was a part of a twelve-mile extension. As to these items, the Court will notice that in each case the goods were used for laying new mains or replacing old mains; and in the case of replacement, they were substantially a re-building. As the burden of proof is on the appellant the claim fails whenever any undetermined part of any item fails to be shown to be in a class entitled to preference.

OUR CLASSIFICATION:

In the subsequent portions of this brief we propose to establish that under no conditions have items of construction been allowed preference; that this

rule applies to a reconstruction and applies to an extension of existing systems; and that so-called service connections constitute an extension of an existing system. And we further propose to show that relief is not allowed by the courts excepting for day to day supplies, and that betterments are not within the rule. Consequently, we have gone through the items of the account as explained and interpreted by the Stipulation and have made a classification of each item, which we think is accurate, with reference to the state of the law which we propose to establish.

The nature of the materials furnished by Crane Company and the uses to which they were put, (the burden of showing which matters rests upon Crane Company) so far as shown in the Stipulation as to the facts, are as follows:

(a)—Gas equipment designed for use in connecting mains with customers:

(A-1)	Aug. 14, 1911.....	\$58.83
(A-4)	May 20, 1912	39.79
		<hr/>
		\$89.72

The property comprising the gas system was sold in October, 1912, and, further, we have no record or means of ascertaining whether they were actually used prior to the sale of the gas plant, or whether a part was sold with the gas plant. Stipulation, A-1 and A-4.

(b)—Water equipment (and in part gas equipment (A-3) consisting of pipes, cocks, claims, etc., placed in stock and used in connection with new service on old mains and on extensions of mains at Vancouver (Exhibit A):

(A-3)	May 11, 1912.....	\$ 95.72
(A-4)	May 20, 1912.....	21.31
(A-4)	May 20, 1912.....	48.75
(A-4)	May 20, 1912.....	36.25
(A-5)	May 24, 1912.....	63.82
(A-7)	June 19, 1912	176.80
(A-8)	June 25, 1912	110.87
(A-9)	July 1, 1912.....	9.10
(A-11)	July 16, 1912.....	110.14
(A-10)	July 10, 1912.....	45.00
(A-17)	May 3, 1913.....	302.25
(A-19)	May 10, 1913.....	300.08
(A-21)	June 12, 1913.....	25.20
		<hr/>
		\$1,347.29

All of these goods involved in the Crane Company's account which were used at Vancouver, except goods referred to in Exhibits A-6 and A-20, were first placed in stock and then were taken from stock as occasion required. In the above statement, unless otherwise noted in the Stipulation, it is not known whether the goods were all used prior to the receivership. Stipulation, Exhibit A, p. 6:

At Hillsboro (Exhibit B)

(B-7)	May 10, 1911 (Stock)	\$195.89
(B-9)	June 4, 1912 (Stock)	38.29
(B-14)	July 12, 1912.....	79.58
(B-18)	May 22, 1913 (Stock)	16.95

— — — —

At Chehalis (Exhibit C)

(C-5)	May 1, 1913 (Stock)	\$173.89
(C-8)	June 27, 1913 (Stock)	78.59

— — — —

\$252.48

At Centralia (Exhibit D)

(D-3)	May 20, 1911.....	\$171.38
(D-5)	April 25, 1913.....	176.84

— — — —

\$348.22

At Kelso (Exhibit E)

(E-1) May 17, 1912 (Stock)\$41.72

Total materials under (b) ...\$4,320.42

(c)—Fire Hydrant System at Vancouver:

(A-2) May 9, 1912\$ 49.00

(A-15) Apr. 22, 1913 127.03

(A-20) May 20, 1913..... 805.26

—————
\$961.29

The Washington-Oregon Corporation made a contract with the City of Vancouver whereby the company agreed to connect its main with the fire hydrants of the City.

The invoice of May 20, 1913, for \$805.26, covers 1,505 feet of 6-inch Matheson pipe; 700 feet of this pipe was used for new mains on Fourth Plain Avenue, such new mains running from the old main at the corner of East Reserve and Fourth Plain Avenue, easterly a distance of approximately 700 ft. The balance was put in stock and was to be used in new mains.

(d)—Extension of water system to shops of
Spokane, Portland and Seattle Railway
Company at Vancouver:

(A-4) May 20, 1912\$ 21.87

(A-4) May 20, 1912 154.03

(A-6) June 19, 1912 1,868.70

(A-12) July 17, 1912 13.16

(A-13) July 23, 1912 85.50

—————
\$2,143.26

These goods consisted of 4,502 feet and 11 inches of 6-inch Matheson pipe for extensions of water main on 39th Street from the intersection of Kaufman

Avenue to the shops of the S., P. & S., a distance of about 1,600 feet. The pipe used up to the shops was about 1,600 feet in length, and the length of the pipes in around the shops took up the balance. There was a 1½-inch pipe running along 39th Street from the corner of Kaufman Avenue about 700 feet westerly. This pipe belonged to some other proprietor who had formerly maintained a water system, and was at the time of the extension used by the Washington-Oregon Corporation. This 1½-inch pipe was taken up at the time that this new installation was made. (Stipulation, Exhibit A-6.)

The extensions of mains herein outlined were necessary to meet the demands for water in the unserved parts of the city and such as were necessary to meet the demands of the customers. (Exhibit A, p. 6.)

(e)—Betterments at the Springs in Vancouver consisting of gate valves, and other water equipment.

(A-14)	April 18, 1913	.....	\$149.66
(A-16)	May 1, 1913	.....	53.44
(A-18)	May 9, 1913	.....	45.90
(A-22)	June 23, 1913	.....	18.00
			<hr/>
			\$267.00

The betterments at the Springs herein referred to were made necessary to provide adequate and suitable supply of water and effective means of delivering the same to the customers. (Exhibit A, p. 6.)

(f)—Water mains, replacing old mains, at Hillsboro:

(B-8)	June 26, 1912	.....\$ 168.55
(B-11)	June 26, 1912	..... 1,680.04
(B-13)	July 1, 1912	..... 28.50
(B-14)	July 1, 1912	..... 28.50
(B-15)	July 1, 1912	..... 33.95
(B-16)	July 1, 1912	..... 18.30
(B-10)	July 1, 1912	..... 79.58
(B-3)	July 20, 1912	..... 66.78
(B-4)	July 29, 1912	..... 116.41
(B-2)	July 30, 1912	..... 15.39
(B-17)	Aug. 1, 1912	..... 28.55

		\$2,264.55

The observations made in the Stipulation under the invoice of June 26th, 1912 (B-11), for \$1,680.04, seem to be applicable to all these materials.

As shown by the Stipulation, this bill covers mains laid in streets prior to paving; six-inch Matheson pipe laid on 2nd Street from 4th to 6th Streets; 3rd Street from Base Line to Washington; 4-inch pipe laid at intersection 5th and Main, 2nd and Oak hydrant extensions. Fittings used on same job. Three oval base valve bases now in stock. These mains were laid in place of old mains, part of which were worn out, and part of which City insisted should be removed. (Exhibit B-11.)

(g)—Water pipe and fittings in Sain Creek extension:

(B-6)	July 23, 1912	.....\$392.40
(B-1)	July 30, 1912	..... 41.76
(B-5)	Aug 5, 1912	..... 17.10

		\$451.26

This twelve-inch pipe (used in B-6) was a part of the gravity system being installed in accordance with an ordinance of the City of Hillsboro under which Washington-Oregon Corporation was operat-

ing, a copy of said ordinance being hereto attached, and marked "Exhibit B-19." This system extended from the City of Hillsboro through the town of Forest Grove and thence to Sain Creek, a distance of about ten miles. The former franchise under which the Washington-Oregon Corporation operated at Hillsboro had expired and this new franchise was granted on certain conditions, as appear from said franchise. (Stipulation, Exhibit B, pp. 2 and 3.)

(h)—Pipes and equipment used in substitution of steel pipes for wood pipes at Chehalis:

(C-1)	May 20, 1912	\$130.41
(C-2)	June 19, 1912	535.28
		<hr/>
		\$665.69

The wood pipes were out of repair and the steel pipe was necessary under the pavement.

(i)—Water gates for use during re-lining of reservoir at Chehalis:

(C-3)	May 1, 1913	\$42.84
		<hr/>
		\$42.84

These were necessary to pump direct on 8-inch line during re-lining of reservoir and also necessary to clean the reservoir.

(j)—Water gates for emergency use at Chehalis:

(C-4)	May 1, 1913	\$111.24
		<hr/>
		\$111.24

Used to prevent shutting off of large residence districts in case of breaks on the six- and four-inch mains.

(k)—Water valve at power plant at Chehalis:

(C-5)	May 12, 1913	\$57.83
		<hr/>
		\$57.83

Equipment necessary to facilitate better and more economical operation of pumps at the power plant.

(1)—Pipes at Chehalis:

(C-7)	May 22, 1913	\$551.11
		<hr/>
		\$551.11

All this pipe was placed in stock. Part used at Vancouver for service connections. 2,100 feet of this pipe was laid from 5th and Pacific Avenue to Chehalis Avenue to John and Pacific. 680 feet for replacements from St. Helens Avenue and Chehalis-Centralia Road to shingle mill. 2,100 feet of pipe was used for the purpose of connection of dead ends of mains necessary to obtain proper circulation and to deliver pure water.

(m)—Water equipment for repair and maintenance of pipes and mains at Centralia:

(D-1)	May 14, 1912	\$ 43.44
(D-4)	June 15, 1912	222.18
		<hr/>
		\$265.62

(n)—Water main extensions at Centralia:

(D-2)	May 17, 1912	\$356.70
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Used in extensions of mains already laid. These extensions were laid and installed in order to meet the demand of the consumers and customers of water in the City of Centralia, Washington, and were only such as were necessary in order to supply the water as demanded by the consumers.

(o)—Water pipe and fittings used in extensions at Kelso:

(E-1)	May 17, 1912	\$ 41.72
(E-2)	July 16, 1912	186.36
		<hr/>
		\$228.08

These materials were used in constructing mains to the Kelso and Wallace schools in said city, in order to furnish water to said schools. Said Washington-Oregon Corporation operated under a franchise making it an obligation to supply said schools with water.

(p)—Miscellaneous water equipment at Kelso:

(E-3) May 6, 1913\$1.88

— — —
\$1.88

The following is a summary of the foregoing classes of materials, showing the use to which such materials were devoted and the time prior to the receivership within which the latest item of each class of such materials was furnished:

SERVICE EXTENSIONS.

- (a) Gas equipment for service connections \$ 89.72 2 yr. 2 mo.
- (b) Water equipment for service connections 4,320.42 2 yr. (note)

NOTE: Except items aggregating \$1074.10, which were furnished somewhat over one year prior to receivership.

MAIN EXTENSIONS

- (d) Extension to S. P. & S. shops at Vancouver.....\$2,143.26 2 yr.
- (g) Sain Creek extensions .. 451.26 1 yr. 11 mo.
- (n) Water main extensions at Centralia 356.70 2 yr. 11 mo.
- (o) Water Main extensions at Kelso 228.08 2 yr.
- (l) Water main extensions at Chehalis 551.11 1 yr. 2 mo.
- (Part service connections at Vancouver)

BETTERMENTS.

(e) Fire hydrant system at Vancouver	\$ 961.29	1 yr.	2 mo.
(e) Betterments at the Springs, Vancouver	267.00	1 yr.	1 mo.
(i) Wood gates at Chehalis..	42.84	1 yr.	3 mo.
(j) Water gates at Chehalis	111.24	1 yr.	3 mo.
(k) Water valve at Power House, Chehalis	57.83	1 yr.	2 mo.

RECONSTRUCTION

(f) Water mains replacing old main at Hillsboro ..	\$2,264.55	2 yr.	
(h) Pipes for replacing mains at Chehalis	665.69	2 yr.	

REPAIR

(p) Miscellaneous water equipment at Kelso	1.88	1 yr.	2 mo.
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The gas system at Vancouver was sold in October, 1912 (Exhibit A-1, Stipulation); the water system at Chehalis, the water system at Centralia and the water system at Kelso were sold prior to the beginning of the foreclosure. (Amended Bill Exhibits D and E).

The aggregate of the above is \$12,512.87; there was due June 1st, 1914, thereon, \$13,223.25, and notes were taken. (Par. VIII. pet). One note was paid a few days before the receiver was appointed, leaving notes in the principal sum of \$11,000.00 unpaid.

POINTS AND AUTHORITIES.

1

While under a few specified and limited circumstances the Supreme Court has declared that unsecured claims were entitled to priority over claims secured by mortgage, the doctrine has been confined

within narrow limits and the Supreme Court and lower courts have constantly warned litigants against the tendency to seek to displace vested liens. The tendency is to narrow the doctrine, not to broaden it.

Thomas vs. Western Car Co., 149 U. S., 95,
37 L. Ed., 663;

Bounds vs. Ry. Co., 58 Fed., 473;

Virginia, etc., Coal Co. vs. Central Ry. Co.,
170 U S., 355, 42 L. Ed., 1068;

Illinois Trust & Sav. Bank vs. Doud, 105
Fed., 149;

Kneeland vs. American Loan & Trust Co.,
136 U. S., 89, 34 L. Ed., 379;

II

Appellant's cases under head of "Nature and Character of Preferential Claims" are not in conflict with the foregoing statement. These cases will be separately discussed hereafter.

III.

The mere fact that the franchise required construction or betterments, or that the value of the mortgaged property was increased, does not entitle the claimant to preference.

Illinois Tr. Co. vs. Doud, 105 Fed., 123;

Rodger Ballast Car Co. vs. Omaha, 154 Fed.,
629;

State Trust Co. vs. Kansas City, 129 Fed.,
455,

And cases in following subdivision.

IV.

Preferences are allowed only for current supplies exclusive of betterments and exclusive of new construction or reconstruction.

- Rhode Island Locomotive Works vs. Continental Trust Co.*, 108 Fed., 5;
Central Trust Co. vs. Colorado R. R., etc., Co., 200 Fed., 85;
Thomas vs. Western Car Co., 149 U. S., 95, 37 L. Ed., 663;
Lackawanna Iron & Coal Co. vs. F., L. & T. Co., 176 U. S., 298, 44 L. Ed., 475;
Todelo R. R. Co. vs. Hamilton, 134 U. S. 295, 33 L. Ed., 905;
Porter vs. Pittsburg, etc., Steel Co., 120 U. S., 649, 30 L. Ed. 830;
Reyburn vs. C. G. F. & L. Co., 29 Fed., 561;
City Trust Co. vs. Sedalia, 195 Fed., 845;
National Trust Co. vs. Townsend, 95 Fed., 850, op. 859-863;

V.

There can be no diversion except against those claims entitled to a preference.

- Toledo R. R. Co. vs. Hamilton*, 134 U. S., 296, 33 L. Ed., 905;
Porter vs. Pittsburg, etc., Co., 120 U. S., 649, 30 L. Ed., 830;
Rhode Island Locomotive Co. vs. Continental Tr. Co., 108 Fed., 5;
Rodger Ballast Car Co. vs. Gas Co., 154 Fed., 629;
Central Trust Co. vs. Colorado Co., 200 Fed., 85;
Thompson vs. Railroad Co., 132 U. S., 681.

VI.

In the absence of special circumstances claims otherwise entitled to preference will be allowed such

preference for six months only prior to the appointment of a receiver.

Westinghouse vs. Kansas City So. Ry. Co.,
137 *Fed.*, 26;

Southern Ry. Co. vs. Carnegie Steel Co.,
176 *U. S.*, 257, 292;

Fosdick vs. Schall, 99 *U. S.*, 255, 25 *L. Ed.*,
343;

Bound vs. Ry. Co., 58 *Fed.*, 473;

Thomas vs. Peoria, etc., 36 *Fed.*, 819;

Thomas vs. Cincinnati, 91 *Fed.*, 195;

Westinghouse vs. Kansas City, 137 *Fed.*,
41;

Chicago & Ogden vs. U. S., etc., Co., 225
Fed., 943;

Blair vs. St. Louis, 22 *Fed.*, 471;

Finance Co. vs. Charleston, 52 *Fed.*, 678;

International Trust Co. vs. Townsend, 95
Fed. 850;

National Bank of August vs. Carolina, etc.,
63 *Fed.*, 25;

Central Trust Co. vs. East Tennessee Ry. Co.,
80 *Fed.*, 624;

Guaranty Trust Co. vs. Galveston, etc., R.
R. Co., 107 *Fed.*, 311;

State Trust Co. vs. Kansas City, 129 *Fed.*,
455;

Moore vs. Donahoo, 217 *Fed.*, 177;

Title Insurance Co. vs. Home Telephone Co.,
200 *Fed.*, 263;

Gregg vs. Metropolitan Trust Co., 197 *U. S.*,
183, 49 *L. Ed.*, 717.

VII.

It is not settled whether the doctrine is applicable to a water company

Short, Law of Railway Bonds and Mortgages, p 594;

Wood vs. Guaranty Trust Co., 128 U. S., 418, 32 L. Ed., 472;

Ford vs. Central Trust Co. 70 Fed., 144;

Louisville & Nashville R. R. Co. vs. Memphis, etc., Co., 125 Fed., 97;

Wheelen vs. Enterprise Trans. Co., 175 Fed., 214.

ARGUMENT

Counsel for appellant seems to rest his case upon the proposition that appellant is entitled to preferential treatment because the supplies, as he claims, increased the value of the security of the bondholders. Counsel predicates this contention upon the statement that these supplies were in some part necessary to preserve the business of the company, in that certain franchises would have been forfeited had there not been certain new construction. This of course does not embrace all the items of appellant's claim, but so far as applicable under the stipulation this is one of the equities on which he expects to prevail; furthermore, appellant seems to contend that the mere fact of the putting in of the supplies increased the security of the bondholders to that extent and therefore it is entitled to treatment in preference to bondholders and of course in preference to the ordinary creditors. Before discussing these or any of the contentions of the counsel in detail we call the attention of the Court to the fact that appellant's position not only requires it to assume

the burden of proof as to facts, but also requires it to overcome the presumption in the mind of the Court that an unsecured creditor is not entitled to outrank a secured creditor, nor is an unsecured creditor presumed to outrank the other unsecured creditors. The presumption of course is that the bondholders having mortgage security are prior to all the unsecured creditors. It is also a natural presumption that all of the unsecured creditors stand on a basis of equality. Since it appears by the allegations of the complaint that the Washington-Oregon Corporation has several hundred thousand dollars of unsecured indebtedness, the burden is upon the intervenor to show some appealing equity before it can be lifted from the level of like claims and be put in a class of superiority over such claims and over the mortgage

I.

The doctrine invoked by appellant is an equitable doctrine applied only where there are special equities, and its indiscriminate application has been steadily denied by the courts. The tendency is to narrow it not to broaden it.

The doctrine in the case of *Fosdick vs. Schall* was *dictum*, but has been generally accepted as authority for the proposition that expenses for current supplies for a period of six months prior to the receivership shall be allowed priority, but the Supreme Court of the United States has in many cases since that time warned litigants and courts against the indiscriminate displacing of contract liens.

In the case of *Thomas v. Western Car Co.*, 149 U. S., 95, 37 L. Ed., 663, Mr. Justice Shiras quoted from *Miltonberger vs. Logansport*, 106 U. S., 286, 27

L. Ed., 117, and from *Kneeland vs. American Loan & Trust Co.*, 136 U. S., 89, 34 L. Ed., 379, the matter quoted being germane to a discussion of the claim for preference in this case. We ask the Court to look at the *Thomas* case and the cases therein referred to. The position of claimant for car rental there under consideration was held by the Court to be "very different from that of workmen and employes or of those who furnish day to day supplies necessary for the maintenance of the railroad." The following language from the *Kneeland* case is quoted with approval:

"The appointment of a receiver vests in a court no absolute control over the property and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts an idea seems to have obtained that a court appointing a receiver acquires power to give preference to any general and unsecured claims * * * * Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot * * * No one is bound to sell a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility and not in anticipation of subsequent displacing of the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be grow-

ing an idea that the Chancellor, in the exercise of his equitable powers, has unlimited discretion in the matter of this displacement of vested liens."

Referring to the *Thomas* case: The Circuit Court of Appeals in *Bounds v. Railway Co.*, 58 Fed., 473, in an opinion rendered in a case in which Chief Justice Fuller sat, used this language:

"The Supreme Court has recently in *Thomas v. Car Company* indicated the narrow limits to which an equity court should confine itself in allowing any unsecured claim to displace vested contract liens. Wages due employees, current operating expenses, current balances of ticket and freight money arising from indispensable business relations, and similar current debts accruing within ninety days, are recognized as among the limited class of claims which, in its discretion, the court may allow to have priority."

See also the opinion of Mr. Justice White as to the need for great care in extending this doctrine, in the case of *Virginia, etc., Coal Co. v. Central Ry. Co.*, 170 U. S., 355, 42 L. Ed., 1068, where claim for coal purchased and used in operating railroad was allowed, but where the court expressly endorsed the intimations contained in the *Kneeland* case and the *Thomas* case, *supra*.

In the case of *Illinois Trust & Savings Bank v. Doud*, 105 Fed., op. 149, all the cases up to that time are reviewed by Judge Sanborn in an opinion which seems to us to be as illuminating as any opinion that can be found. The court's conclusion is in this language:

"The test of the preferential equity of a claim is its consideration. If its consideration was a *current expense of the operation of the mort-*

*gaged property which inured to its benefit, and which was incurred in the ordinary course of its business within a limited time anterior to the appointment of the receiver, the claim may be preferred * * * If the consideration of a claim is not a part of the current expense of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income, to secure it, will give the claim a preferential equity over the lien of a prior mortgage."*

In considering the claim of the intervenors in that case, where their supplies had gone into the construction of a new power house and machinery thereof, Judge Sanborn uses this language:

"While there are *dicta* in some of the earlier opinions of that court (notably in *Fosdick v. Schall*) upon which a plausible argument that a claim for material or money furnished for a permanent improvement to the mortgaged property may be preferred to a prior mortgage, there is no decision of that court to that effect or adverse to the principles established and affirmed by the lines of cases opening with *Dunham v. Railway Company*, 1 Wall. 254, 267; 17 L. Ed. 584, and closing with *Lackawana Iron & Coal Company v. Farmers Loan & Trust Company*, 176 U. S. 298, 44 L. Ed. 475."

The court then states the doctrine, as he understands it fully, and we ask the court to read this case in full.

The case is authority on the proposition that

materials for extensions (as items c, d, e, g, l, o, as well as all service extensions) and betterments (as items e, i, j, k) are not entitled to preference.

The cases are so numerous that we cannot hope to touch them all but believe that the cases referred to as illustrative actually show the state of the law, and they are to be distinguished from the few cases where the courts have proceeded upon the theory that the test was whether the property was benefited, as distinguished from whether the supply was an actual current supply.

II.

APPELLANT'S CASES UNDER HEAD OF "NATURE AND CHARACTER OF PREFERENTIAL CLAIMS"

An examination of the cases cited by the appellant on this point shows that they are not in conflict with the rule as stated by us. We will briefly refer to each of the cases:

Fosdick v. Schall, 99 U. S., 255, 25 L. Ed., 343. A claim for preference was disallowed and the remarks of the court were in way of *dictum*. Since there was no occasion to apply the doctrine which was stated to exist, the case cannot be considered any test of what constitutes operating expenses.

Fosdick v. Car Company, immediately following the case of *Fosdick v. Schall*, was one where the claim of the vendor for certain cars, or their cost value, was allowed not on any equitable theory, but upon the theory that the vendor retained the ownership of the cars and when the cars were included in the foreclosure sale the vendor was of course entitled to retake the cars or their value.

Moore v. Donahoo, 217 Fed. 177, in this Circuit, is one where the Master found that the claim which accrued within six months immediately preceding the appointment of the receiver "on account of labor done and materials furnished in the ordinary course of business for the normal maintenance and operation of the railroad and which it was reasonable to expect would be paid out of the current operating income, etc." aggregating a certain sum of money. The character of these claims were not in controversy; but if it had been, the doctrine of the court is all in favor of our contention. The claims which were allowed a preference were claims which were purely operating claims. The actual holding of the court is that such claims incurred within six months are entitled to preference to the extent only where there has been a diversion.

Farmers' Loan & Trust Co. v. K. C. W. & N. Ry. Co., 53 Fed. 187. This is a decision by Judge Caldwell, circuit court of Kansas, and was a case wherein the court had as a condition of the receivership imposed the payment of certain obligations. Some of these obligations apparently were for labor and supplies furnished in the construction as well as in the operation of the road. No distinction was made or considered between construction and operation but the claims were sustained not because they are entitled to preference under the rule, but because if they are not entitled to come under the rule "No one can complain so long as the debts allowed come within the terms of the order." The court evidently takes exception at the action of the bondholders in seeking to protect their right after their trustee had consented to the making of the order, and from the whole opinion it is obvious that this act of the trustee was

the basis of the decision. Even if the decision be considered, however, as a decision independent of the action of the bondholders in consenting to the preference, it is clear that the case is not in accordance with the authorities and is one of the few cases where the Federal courts have departed from the well settled rule that materials or labor for construction do not entitle claimant to preferential treatment.

The Supreme Court in the *Miltenberger case* (106 U. S. 286, 27 L. Ed. 117) distinguished between claims which arose prior to the receivership from those which arose during receivership, and said on this point:

“The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by *special circumstances*. It is easy to see that the payment of unpaid debts for operating expenses, *accruing within ninety days*, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense.” etc.

The *Miltenberger case* was a case where the Supreme Court had under consideration the question

of priority of obligations incurred by the receiver, and also the questions concerning a priority of obligations prior to the receivership; and this case was the case referred to in the case of *Gregg v. Metropolitan Trust Company*, 49 L. Ed. 717, 197 U. S. 183, where the Supreme Court recognized payments made by the receiver as a matter of business necessity, as distinguished from payments which would be equally meritorious, but which were not required to be made to preserve the business of the company. It is to be borne in mind that in the Miltenberger case the court was considering the validity of obligations which had been incurred *by the receiver* as a matter of business necessity. The holding that the receiver should properly pay the freight bill where he could not continue an indispensable interchange arrangement unless the freight bill was paid, is not at all a holding that such a freight bill in itself is entitled to a preference. As stated in the argument, in the particular receivership now under consideration, bills for power were paid by the receiver under the order of the court because under the contract for furnishing power there was danger that the entire supply would be cut off unless prompt payment of all bills was made. The suppliers of this power were perhaps not entitled to a preference because of the nature of the supply, but they were in position to enforce a payment or by their action cause a very great loss to the trust. So, as in the Miltenberger case, it was necessary to make the payments to laborers who could by discontinuing the performance of their duties throw the whole business of the trust into hopeless confusion. Instances could easily be multiplied, but it is sufficient to point out the distinction.

Union Trust Co. v. Illinois Midland R. R. Co., 117 U. S. 434, 29 L. Ed. 963. No comment seems to be necessary, as the doctrine of that case is in no way opposed to our contention.

Again referring to *Miltenberger v. Logansport*, 106 U. S. 286, 27 L. Ed. 117, so far as the payment of prior accounts was allowed, it was for supplies within ninety days and the allowance was considered a business necessity. It is not an authority at all as to the nature of rights which are equitably entitled to preferential treatment, but is only authority for the proposition that receivership in the course of business must make payment when such payments are necessary to prevent the severance of vital business relations.

Northern Pacific Ry. Co. v. Lamont, 69 Fed. 24. Careful inspection of this case shows that it was in effect for *rent* of a waiting room in North Dakota. The language used is quite general; and if some of it is not within line with the Supreme Court decisions, it must be considered, like the case of *Farmers' Loan & Trust Co. v. R. R. Co.*, 53 Fed. 184, by the same court, as an ill-advised decision.

Union Trust Co. v. Morrison, 125 U. S. 591, 31 L. Ed. 825. The liability did not accrue until after the receivership, and the fact that the bond was signed long prior to the receivership is immaterial. One of the grounds of the decision is that the act of the surety saved the *corpus* of the estate where such *corpus* was in danger by reason of the negligence of the trustee of the mortgage in allowing the mortgagor while in an insolvent condition to continue to operate the road; another circumstance given consideration was the fact that the court had, on the applica-

tion of the receiver *and without objection from the mortgagee*, entered an order for the protection of Morrison, but the receiver had then diverted the income and not protected Morrison. See *International Trust Co. v. Townsend*, 95 Fed. 862, for a discussion of this case.

Southern Ry. Co v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed. 458. We can see nothing conflicting with our position in this decision. We are quite willing to concede a priority to claims incurred within seasonable time and in the ordinary course of business, for “debts of a railroad company (for current expenses) contracted within the ordinary course of its business.” In this case the court considers the amount of the purchases of rails in comparison to the length of lines controlled by the railway company and the condition of the tracks, and considers that such purchases were made in the ordinary course of business.

Bellingham v. N. W. Ry. 49 Pac. 515. The doctrine we have under consideration is the doctrine of the Federal Courts and we do not consider that the Washington cases are authority. However, the Court will note that the equity arose because of the negligence of the trustee to take possession through the medium of a receivership or otherwise. This principle was applied in a number of the cases, among others the Morrison case, but it is not applicable here because the record shows that the receiver was appointed as soon as a receiver could be appointed after the default in the payment of the interest.

St. Louis Trust Co. v. Riley, 70 Fed. 36. No preference was allowed, and the statements of Judge Sanborn are therefore in the nature of *dictum*. Coun-

sel underscores the language that the claim must be founded upon supplies or services which either *preserved or enhanced* the value of the security of the mortgage debt, but it is easy to find general discussions of any legal proposition which does not with nicety distinguish various differences which arise in applying the doctrine but are not under consideration when the particular language is used. The Court will discover this very well illustrated by examining the case of *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123, where Judge Sanborn, discussing a case which involves the question of whether an improvement or construction item is entitled to preference, very fully expresses his views, which are entirely out of line with appellant's contention. We respectfully request the Court to read the whole of the *majority* opinion, being that of Judge Sanborn. We think this opinion is one of the most valuable opinions in the books, not for what the dissenting judges say but for what the majority judges decide and say. It contains a summary up to that date of the law on many questions which arise in this case.

Loveland v. Blair, 222 Fed. 210. This is a case in which there has been a prior order for payment of operating claims entered. The question was principally whether the claimants were within the terms of the order. There was some discussion as to the diversion theory, but no diversion was shown. We see no value in the case, as bearing on any question in this matter.

Toledo Ry. Co. v. Hamilton, 134 U. S. 296, 33 Law Ed. 905. In this case the Supreme Court declined to allow preference for the construction of a dock, notwithstanding the "consequent improvement

of the mortgaged property.” It is wholly an authority supporting our contention that improvements as distinguished from repairs are not entitled to preferential treatment.

In *Union Trust Co v. Souther*, 107 U. S. 594, 27 L. Ed.488, the court appointing the receiver had required the payment of labor and supply bills incurred within six months prior to the appointment. Thereafter instead of so applying the income the whole net amount thereof was used “in purchasing additional grounds and making permanent repairs and improvements.” The Supreme Court held that the lower court had not intended to disturb or change the order of appointment in that it required the payment of labor and supply credits, and that they were entitled to payment in accordance with the terms of the original order of appointment. We are unable to discover any theory on which this case is an authority opposed to any of our contentions.

The cases cited on page 16 of appellant’s brief may be briefly referred to.

Central Trust Co. v. Wabash Ry. Co., 30 Fed. 332; this case does not involve any question with which we are now concerned.

In *Trust Company v. Clark*, 81 Fed. 269, the court seems to have considered a gear wheel and pinion as an item of repairs.

Manhattan Trust Co v. Sioux City Cable Co., 76 Fed. 658, and *Ry. Co. v. Wilson*, 138 U. S. 501, are cases where a power bill was allowed as a current supply, and where attorney’s fees to a small amount, about \$300, were allowed, the latter upon the equitable principle that the attorneys had brought to a

receiver certain property and were entitled to an equitable lien thereon. The Manhattan Trust Company case is also stated by appellant under sub-head 5 to uphold an allowance for an electric generator. The statement is true, but the allowance was not on any equitable principle but because the claimant had rights under a conditional sale contract.

In *Cleveland, etc., Ry. Co.*, 86 Fed. 73, the claim allowed was not for the *construction* of a railroad bridge, but for *repairs* on a railroad bridge. It is of course in line with our cases.

We do not have access to the following case, *Atkins*, 3 *Hughs*, 307

Farmers' Loan & Trust Co. v. American Water-works, 107 Fed. 23, is not in point. Judge Sanborn declines to allow a preference upon the principle herein sought to be invoked in this language:

“The contention of counsel for the intervenors that one who furnishes materials that are required to *construct* a necessary improvement or extension of a mortgaged plant of an operating public or quasi-public corporation, thereby acquires an equitable lien on the income earned subsequent to the appointment of the receivers in foreclosure, superior to that of the mortgage bondholders, cannot in my opinion be successfully maintained.” (p. 26)

After citing the cases on the doctrine under consideration and on page 31 the court does allow the claim as *against certain moneys earned prior to the appointment of the receiver* on behalf of the mortgage bondholder and collected by the receiver. We do not have that question here.

We believe that none of the cases cited by the

appellant on this branch of the case are inconsistent with the position which we take.

III.

The mere fact that a franchise requires construction or betterments or that the value of the mortgaged property was increased, does not entitle claimant to preference.

Counsel has cited no cases where preference has been given because franchises of the corporation would be lost unless certain improvements were made. The Court will find an instructive case on this point and on many of the points involved in this case in

Illinois Trust Co. v. Doud, 105 Fed. 123, where it was contended that the building of a new power house was necessary to prevent a franchise from being forfeited. In that case, as in this case, the defendant company had three different classes of business. Judge Sanborn found that the petitioner had met the burden of showing that the new building and machinery were necessary to enable the railway to continue furnishing electric light to the city (though it could have continued all its other business without them) and the court nevertheless declined to award preference. This case is also clearly in point on the proposition that the mere fact that the property was bettered or its value increased is not any reason for sustaining appellant's petition.

Rodger Ballast Car Co. v. Omaha, etc., 154 Fed. 629, is a case where the Ballast Car Company sought a preference because re-ballasting of the road was necessary as the Public Service Commission had threatened to discontinue traffic on the road unless it was re-ballasted. The requisite ballast cars were

sold by the intervenor. Under the facts disclosed in the case there is no doubt that the claim was a meritorious one in itself; that the supplies were necessary to prevent traffic being discontinued and that the bondholders would get an additional value because of the cars furnished by the Rodgers Company. Claim of preference was disallowed *because the claim was not for current operating supplies*. This case is analogous to the claim of appellant in the case at bar in that the right to continue to do business was preserved by the furnishing of the ballast cars. The two cases just referred to will be taken up again in the course of this brief. They are both leading cases and fully discuss the doctrine which is here under consideration.

State Trust Company v. Kansas City, 129 Fed. 455, is one where the U. S. Circuit Court for the Western District of Missouri refuses to allow preference for equipping cars with air brakes, though such equipment was required by Act of Congress.

IV.

Preference allowed only for current supplies, exclusive of betterments and exclusive of new construction or reconstruction.

An examination of our summary or classification of the various items of material furnished will show, we believe, that the materials furnished by the appellant consisted of service extensions, main extensions, betterments and reconstruction items. We believe that the courts have established that service extensions of a gas or water plant are just as necessary to make a complete plant as any other part of the construction. We therefore assert that service

extensions are not to be considered as repairs or maintenance, but as construction items.

The same principle clearly applies to extensions, as for instance, the extensions to the Spokane, Portland and Seattle shops at Vancouver. Under the authorities expenses for extensions are distinguished from expenses for current supplies. The same principle, of course, will apply to the extensions at Centralia, at Kelso and at Chehalis. Furthermore, the authorities which we herein cite are convincing that anything which is in the nature of a betterment as distinguished from a mere current supply, is not entitled to preferential treatment, and furthermore, that the replacing of worn out equipment on any extensive or elaborate scale at all, amounts to a reconstruction and is in no case within the category of repairs. From a survey of these cases and independent of the element of time, and the other circumstances of this case, the claim of the appellant ought to be disallowed. Moreover, the record shows that prior to the appointment of a receiver herein, the gas plant at Vancouver, and the water plants at Chehalis, Centralia and Kelso were disposed of and it is herein sought to impound the earnings of the receivership from other plants to pay bills for those plants (Amended bill Exhibits D and E, Stipulation A-1.)

Rhode Island Locomotive Works vs. Continental Trust Co., 108 Fed., p 5. This was a claim for the value of twelve locomotives. They of course increased the value of the mortgaged security but were disallowed because they were not a current operating charge but were an addition to the equipment.

The locomotives were to be paid for in monthly installments.

Central Trust Co. vs. Colorado Ry., etc., Co. 200 Fed., 85. A claim for furnishing and installing boilers was disallowed because it was made with a view to the extension of the business of the concern rather than for present use.

Thomas vs. Western Car Co., 149 U. S., 95, 37 L. Ed., 663, where car rental was held not to be a preferred debt.

Lackawanna Iron & Coal Co. vs. F., L. & T. Co., 176 U. S., 298, 44 L. Ed., 475, where a claim for the purchase price of rails "imperatively required to make a railroad safe for the transportation of persons and property" will not be deemed current debt which may be paid out of the current receipts of a railroad company in preference to a mortgage debt, if the repairs to the road made to be put in proper condition are so extensive as to amount to a reconstruction or the construction of a new road. This case merits careful study. We think that the doctrine of the Supreme Court here expressed absolutely demonstrates that reconstruction items (as (f), (h) and (p) our classification), cannot be allowed a preference.

Toledo R. R. Co. vs. Hamilton, 134 U. S., 296, 33 L. Ed., 905, where claims for the construction of a dock, admittedly improving the mortgaged property, were denied, the court stating that "the equitable principles of the cases heretofore discussed had no application. The work which Hamilton did was *original construction* and not in keeping up as a going concern a railroad already built. The amount due him was no part of the current expenses of op-

erating the railroad. *There was as to him no diversion of current earnings for the payment of current expenses."*

Mr. Justice Brewer cites and approves the case of *Porter vs. Pittsburg & Bessemer Steel Co.*, 120 U. S. 649, 30 L. Ed., 830, where the claims were denied, because for original construction instead of for current operating expenses.

Both of these cases also show that *there can be no diversion in favor of the bondholders as against a creditor* whose claim is for construction. See also, as illustrative of the rule that it is immaterial that the work done has tended to conserve the railroad or enhance the property to the mortgagee, the case of *International Trust Co. vs. Townsend*, etc., decided by Judge Lurton and Judge Taft of the 6th Circuit, July 5, 1899, 95 Fed., 850 op 859, 863.

In the case of *Reyburn vs. C. G. F. & L. Co.*, 29 Fed., 561, the court disallowed a claim for meters because meters are not a current necessity but were in the nature of construction. They are rather new equipment constituting an addition or extension of the business. The language of the court in part is as follows:

"The debt was wholly contracted for gas meters, which were a part of the gas works of the company and as much required for the complete and operative construction of the works as any other part of the plant or machinery of the works. It is impossible as the proof shows for the gas company to sell gas without meters with which to measure and distribute it to their customers and from which the accounts are to be made up and the bills collected. *It seems to me that it requires meters to make the works of the gas company*

complete as much as pipes and generators, and no gas works can be said to be in operating condition unless they have an adequate supply of meters. The claim therefore comes within the definition of a claim for material furnished for the construction of the works and from the decision of the Supreme Court of the United States in Fosdick vs. Schall, 99 U. S. 235, down to the present time, I have seen no case which contemplates, except under very peculiar circumstances, that general creditors who have furnished more material for the construction of works of this character are to have a lien, as against the lien of the mortgagees."

Discussing this and other claims after holding the claims to have accrued more than sixty days prior to the appointment of the receiver and therefore too old, the court says:

"But a more conclusive and satisfactory reason to my mind why these claims should not be allowed, is that none of them are operating and supplying claims. They are all for constructive material, such as meters, pipes and other material which was used in the construction of the works and not in their operation after they are constructed."

This case is on all fours with the instant case, particularly with reference to the connections with customers in both the gas and water plants. The case exactly fits the items (a) and (b) of our classification.

The *Reyburn* case is in accord with accounting practice which charges service extensions to *capital* and not to operation.

City Trust Company vs. Sedalia, 195 Fed., 845; claim for expense of a flagman—not allowed because not an operating expense.

THE DECISIONS APPLIED

Applying the cases to the facts as summarized by us in this brief, we submit the *Reyburn* case, 29 Fed., 561, especially applies to the items of (a) and (b) our classification; and the *Doud* case, 105 Fed. 149, to (b); the *Thompson* case, 132 U. S. 68, the *Hamilton* case, 134 U. S. 296, the *Reyburn* case and the *Rhode Island Locomotive Company* case, 108 Fed. p. 5, specially apply to the items under the heads of "Main Extensions" and "Betterments;" the *Lackawanna* case, 176 U. S. 298, specially applies to the items under the head "Reconstruction." The other cases cited by us and many of the cases cited by appellant, all tend to establish—and taken as a whole they do establish—the proposition with which we started, that preference is allowed for supplies used for *necessary operating purposes* and is not allowed for construction, including in this term extensions, betterments, improvements, additions to equipment, etc.

V.

There can be no diversion except against those claims entitled to preference.

The bill of complaint shows that interest is paid up to October, 1913. The stipulation is an admission that in addition to the interest thus paid, there was net operating income sufficient to pay the claim of Crane Company. This is not an admission that there has been any diversion but leads to the conclusion that if the appellant is otherwise entitled to preferential treatment it is not precluded because there is no fund.

There can be no diversion as against those claims which are entitled to a preference. Of course

it is not a diversion to pay interest if the bondholder is entitled to the payment of interest in priority to the claim of the creditor claiming that such diversion exists.

Toledo R. R. C. vs. Hamilton, 134 U. S. 296,
33 L. Ed. 905 *supra*;

Porter vs. Pittsburg, etc., Co., 120 U. S.
649, 30 L. Ed. 830 *supra*.

The idea of diversion implies that something wrong has been done, but nothing wrong has been done by the payment of interest if the bondholder is entitled to his interest more than Crane Company is entitled to its payment; so that to assert that there has been a diversion is to assert that Crane Company is prior in right to the bondholders, which is the question to be decided.

The mere fact that interest has been paid or improvement made does not entitle the claimant to a preference.

Rhode Island Locomotive Co. vs. Continental Trust Co., 108 Fed. 5;

Rodger Ballast Car Co. vs. Gas Co., 154
Fed. 629;

Central Trust Co. vs. Colorado Co., 200 Fed.
85.

In the case last cited the court says—before rights to a preference is established it must be shown:

“First, that the claim has been part of the current expenses in the regular course of business, and second, if such, there must have been a diversion of the net income (from which current expenses are properly payable) to betterments, interest charges, or other purpose beneficial to the mortgage creditors, thus detracting from

claimant's equity to the fund and thus calling for reparation out of the sale of the property. The facts of the present case do not bring the claim whether accruing before or after May 16, 1911, within either, much less both, of the essential conditions last named." (Our italics).

Evidence that interest has been paid or improvements have been made out of the income is germane only as establishing that *if the claimant is otherwise entitled to a preference* there is a fund from which payment can be made to it. There is no conflict in the cases on this point, but counsel has quoted from certain of the opinions of the Federal Courts, language which taken alone might lead to the conclusion that the mere fact of diversion or the mere fact of payment for interest or for improvements would entitle a creditor to preferential treatment. No detailed discussion is necessary to demonstrate that this is not the law, as it has never been asserted to be the law by the courts and is not a part of the doctrine under which claimant seeks preferential treatment. See on this point *Thompson vs. R. R.*, 132 U. S., 68.

In his subdivision V, beginning at page 36, appellant makes brief reference to the income of the receivership. The Court will note that by an error the brief states that the receiver collected a net income of \$123,000.00,—this amount should be \$23,000.00 instead of \$123,000.00. Counsel argues from this fact that this amount should have been used for the payment of appellant's claim. The same stipulation (Transcript page 79) shows that during all of the period of the receivership no interest was paid on either the first or the second mortgage, and in claiming that this money should have been used to pay the appellant, counsel is begging the question

which is,—Whether appellant's claim is entitled to priority over the bonds. Furthermore, the amended bill of complaint shows that the mortgagor was indebted to general creditors to the extent of more than \$50,000, Par. 23, and in asserting that the net earnings of the receivership should have been applied to the payment of the appellant's claim, appellant is assuming that the rights of the other general creditors are inferior to that of the appellant.

On pages 46 and 47 of its brief appellant makes some statements which are so far from sustained by the record we feel bound to take notice of them. According to these statements Crane Company

“ * * * came forth at a time when the company was in danger of losing its franchises, when its property had become debilitated, when it was necessary to make extensions, lay new mains and otherwise comply with its franchises * * * Furthermore, to magnify the inequity and add a grim irony to the situation, the mortgage bondholders were, during this time, taking and receiving money from the corporation that, under all of the authorities, equitably belonged to Crane Company * * * In the receiver's report filed herein it will be found that the estimated value of its properties is given in such an amount as to clearly indicate that what Crane Company put in increased the value of the properties more than tenfold.”

These statements are extraordinary, and if the records sustain them, would be very remarkable. It may be said in passing that the receiver's reports are not in evidence for the purpose of showing the value of the properties under the receivership, nor is it recalled that the receiver ever attempted to value the properties, but if it could be demonstrat-

ed that the \$11,000.00 "put in" as counsel says by Crane Company, multiplied the value of the Washington-Oregon Corporation holdings by ten, Crane Company certainly would be entitled to consideration, though not in this case, even then. If, for instance, the holdings of the Company were increased from \$100,000 to a million dollars by the expenditure of \$11,000, the person expending that \$11,000 would be entitled to some consideration though he would not be entitled to the relief asked in this proceeding. Of course these statements are not true, and they are not sustained by the evidence. It is only true that the bondholders got their interest for a period during which the appellant got out nine-tenths of the principal of its claim, so that while the appellant make a healthy profit on furnishing goods to the Washington-Oregon Corporation, the bondholders who advanced their money on the faith of presumed mortgage security, stand to lose the principal. The record further shows that appellant received payment of one note (about \$2,300) just prior to the receivership. (Transcript p. 31.)

VI.

In the absence of special circumstances claims otherwise entitled to preference will be allowed such preference for six months only prior to the appointment of a receiver.

The remarkable doctrine asserted by counsel under Subdivision III of his brief, beginning on page 31, does not seem to be entitled to detailed discussion. This doctrine is that regardless of time if the creditor comes within the designated class it is entitled to priority. The assertion that such is the law is attempted to be bolstered up by quoting from *Fos-*

dick vs. Schall, where claims accruing within six months were not allowed; and *Fosdick vs. Southwestern Car Company*, where cars belonging to the petitioner were held to still belong to the petitioner notwithstanding the foreclosure sale; by the case of *Moore vs. Donahoo*, 217 Fed. 177, where claims were allowed which accrued *within six months*; and from several other cases, in none of which did the claims accrue more than a year prior to the receivership. Counsel's contention appears to be that because time was not considered, therefore the claims would have been allowed even though they had accrued a good while prior to the time when they did accrue. As an example of a *non sequitur*, this contention is *par excellence*. We are content to forego any further comment upon this strange theory. We think it sufficient to quote the following language of Judge Sanborn in *Westinghouse vs. Kansas City So. Ry.*, 137 Fed., 26, to-wit:

“Mortgage bondholders have the right to the payment by the mortgagor of the current expenses of the operation of the railroad by their debtor with reasonable promptness. The reason that six months is approximately the limited time within which preferential claims must accrue is that there is usually an interval of six months between the dates when installments of interest upon the bonds fall due, and the mortgages generally provide and the warranted inference is, that, when an installment of interest is paid, current expenses to that time have either been paid, or funds to pay them have been lawfully provided. The failure of the Gulf Company to pay this debt of the petitioner in November, 1897, when it was due, was a violation of the covenant in its mortgage, unless the creditor released its paramount lien, and thus withdrew its

claim from the class of claims covered by that covenant from the class entitled to a paramount lien.

“The approval of the extensions of the times of payment of preferential claims by agreements, between the debtor and the claimants which are not placed on record and are generally unknown to the bondholders and their trustees, would enable simple contract creditors to pile up large debts of the mortgagor secured by secret liens paramount to railroad mortgages, *would permit them to thus impair the security and to evade the legal effect of the contracts contained in the mortgages, and, by concealing the actual defaults of the mortgagor, would allow them to indefinitely deprive the bondholders of the possession and application of the property to the payment of their bonds and coupons until their security might be practically destroyed.* (Citing cases.) In *Morgan’s, etc.*, 137 U. S., 171, 196, 11 Sup. Ct., 61, 69, 34, L. Ed., 625, Mr. Chief Justice Fuller, in delivering the opinion of the supreme court upon the question whether those who, like the petitioner, assist in the diversion of income to the payment of interest and thereby prevent defaults which entitle the bondholders to the property, may enforce liens paramount to that of the mortgage, said:

‘By the payment of interest the interposition of the bondholders was averted. They could not take possession of the property, and should not be charged with the responsibility of its operation. It is true that a railroad company is a corporation operating a public highway, but it does not follow that the discharge of its public excuses it from amenability for its private obligations. If it cannot keep up and maintain its road in a suitable condition, and perform the public service for which it was endowed with its faculties and franchises, it must give way to

those who can. Its bonds cannot be confiscated because it lacks self-sustaining ability. To allow another corporation, which for its own purposes has kept a railroad in operation in the hands of the original company, by enabling it to prevent those who would otherwise be entitled to take it from doing so, a preference in reimbursement over the latter on the ground of superiority of equity, would be to permit the speculative action of third parties to defeat contract obligations, and to concede a power over the property of others which even governmental sovereignty cannot exercise without limitations.”

Counsel's brief shows that within the six months period appellant furnished goods to the value of \$56.03; within fifteen months it furnished goods to the value of \$3,038.00; and within two years and three months it furnished goods to the extent of \$6,169.41; within three years to the extent of \$58.23; and within three years, three months, goods to the extent of \$195.89.

While it is perhaps not very material, we think our division a more natural one. From the amended petition itself it will be seen that the materials for which claim is made were furnished during the following periods prior to the appointment of the temporary receiver (July 31, 1914.)

\$56.03 within 6 months prior to the receivership.

\$0000 in more than six months and within one year.

\$3,038.01 more than one year and within eighteen months.

\$45.65 more than 18 months and within two years.

\$7,898.64 more than two years and within 2 years 6 months.

\$58.23 more than two years and six months and within 3 years.

\$195.89 more than 3 years and within 3 years and 3 months.

Before discussing other cases, we desire to briefly consider some of the cases cited under the heading of "time" (subdivision VI) by appellant. We think that the excerpt from *Southern Ry. Co. vs. Carnegie Steel Co.*, 176 U. S., 257, 292, found on page 42 of the brief, states the rule. Doubtless there is no six months rule in the sense that the courts will under all circumstances enforce that limitation, but there is such a rule in the sense that ordinarily that is the limit of time beyond which the courts will go. Like most rules predicated principally upon the discretion of the courts, there must be some elasticity; and if a claim appeals to the equities to a sufficient degree and if there is some special reason why the limitation of six months should not be enforced, the courts have in a number of instances extended that limitation. An inspection of the cases referred to by the appellant as showing the most favorable limitation of time which has been allowed by the courts, will convince the court, we think, without argument, that this case is not within the most favorable construction of the rule.

In the case of *New York Guaranty & Indemnity Co. vs. Tacoma Railway, etc., Co.*, 83 Fed. 367, cited on page 48 of the brief, the court will note that the time allowed was actually less than a year, the time during which litigation was pending to establish the claims being excluded by the court from consideration. Excluding this time, the claim ran less than twelve months, though by an error in the court's opinion (which error is shown by reference to the

statement of facts as to when the cable was sold), the time would appear to be a few weeks more than a year. This case involved only a few hundred dollars and the doctrine was not exhaustively considered, and the case cannot be considered as establishing that this Circuit has adopted any other or different rule from the rule adopted by the Supreme Court and by the other Circuits.

Hale vs. Frost, 99 U. S., 389. Time was nowhere considered or discussed. The interest due on the bonds defaulted a few months after a balance was struck between intervenor and mortgagor, but the bondholders funded their coupons then, and at the following interest periods until just prior to the time foreclosure was begun, and a receiver appointed. If time had been considered this fact would have been a sufficient reason to distinguish the case from the instant case. The case is, however, authority for the point that construction items cannot be allowed.

Trust Co. vs. Morrison, 125 U. S. 591, 31 L. Ed. 825. As heretofore stated, the liability of the surety was not fixed until after a receiver was appointed and it is not authority for any claim extending back of the six months period.

Southern Railway Co. vs. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed., opinion 473. The supreme Court held that a preference might be allowed

“although the contract for the rails was a few months back of the six months immediately preceding the receiver’s appointment. * * * No absolute rule on the subject has been prescribed by statute or by judicial decision. A claim accruing back of the six months immediately pre-

ceding the appointment of a receiver may under the circumstances of the particular case be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. Touching this question of time and the principles upon which the equitable rights of creditors in such cases as this rest, Mr. Justice Brewer said, in *Blair vs. St. Louis, etc., R. R. Co.*, 22 Fed. 471, 474:

‘The idea which underlies them I take to be this: that the management of a large business like that of a railroad company cannot be conducted on a cash basis. Temporary credit in the nature of things is indispensable. Its employees cannot be paid every month; it cannot settle with other roads its traffic balances at the close of each day. Time to adjust and settle these various matters is indispensable. Because in the nature of things this is so, such temporary credits must be taken as assented to by the mortgagees. In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees and such claims preferred.

* * * There is no arbitrary time prescribed and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary.’ ”

Farmers Loan & Trust Co. vs. K. C. W. & M. Ry. Co., 53 Fed. (op. 187). In this case Judge Caldwell quotes from a letter of Judge Brewer’s in which the language referred to in appellant’s brief is used. There was no contest as to the claims. If there had been a contest, Judge Brewer, in a letter, *thought*

that this would have been his decision. In this case as appears by the statement “most” of the claims “were contracted not many months before the filing of the bill.”

Bellingham Bay Imp. Co. vs. Fairhaven, etc., Ry. Co., 49 Pac., 514. This is not a Federal Court case and is not in line with the rule as established in the Federal Courts.

We do not give special attention to the cases referred to by counsel where the court did not consider time as an element. If the court did not consider it an element, certainly the decision is not of much value on the question of time. An inspection, however, of the cases will show that the Supreme Court has allowed claims accruing prior to the receivership for the following periods: *Trust Company vs. Morrison*, accrued *subsequent* to the receivership; *Burham vs. Bowen*, 111 U. S. 783, 28 L. Ed. 596, accrued within eleven months; *Gregg vs. Metropolitan Trust Co.*, 197 U. S. 183, 49 L. Ed., 717, accrued within six months; *Fosdick vs. Schall*, accrued within six months.

We note the following illustrative cases, in many of which time is considered and determined:

Bound vs. Railway Co., 58 Fed. 473, Judge Fuller participating. Claim for eighteen months disallowed. Doctrine discussed and its narrow limitations referred to.

Thomas vs. Peoria, etc., R. R., 36 Fed., Opinon, 819. Six months rule applied.

Thomas v. Cincinnati, 91 Fed. 795. Judge Taft applies the six months rule as against labor claims.

Westinghouse vs. Kansas City, 137 Fed. 41. Judge Sanborn applies six months rule. See also *Chicago Alton vs. U. S., etc., Co.*, 225 F. Ed. 943.

Blair vs. St. Louis, etc., 22 Fed. 471. Six months rule applied by Mr. Judge Brewer.

Finance Co. vs. Charleston R. R., 52 Fed. 678. Claim for legal services rendered two years prior to the receivership was denied, the court saying:

“Fosdick v. Schall led the way to the displacement of the mortgage lien, permitting certain favored claims to be paid before the mortgage debt either out of the income or out of the proceeds of the sale. But the courts have carefully guarded themselves from extending these claims, which were for materials, supplies and labor necessary for keeping the railroad a going concern, and have expressly refused to consider any claim originating more than six months before the appointment of receiver.”

And on page 679 the court holds that it does not help the claim that the bondholders were benefitted.

International Trust Co. vs. T. B. Townsend, 95 Fed. 850. This case, decided by Judge Lurton, with Judge Taft a member of the court, sustains the six months rule in its entirety, and disallowed claims back of that period. The court also holds that the fact that the supplies increased the value of the road is immaterial. We invite attention to the case.

National Bank of Augusta vs. Carolina R. R. Co. 63 Fed. 25.

“This period (preferential period) never is beyond six months, but in exercising this equity the court goes upon dangerous grounds and there-

fore proceeds cautiously, keeping rigidly within prescribed limits."

In *Thomas vs. Peoria*, 36 Fed. 808, *supra*, decided by Judge Harlan of the 7th Circuit in 1888, all claims for car rental were disallowed which had been accrued more than six months prior to the receivership, regardless of the fact that diversion had been made of the current income. The court used this language:

"The general rule that has obtained in this circuit for many years, though not fully or expressly formulated in any public decision, has been not to charge the income of mortgaged property accruing during a receivership or the proceeds of the sale of such property, with general debts for labor, supplies and equipment back of the six months immediately preceding the appointment of the receiver. While the court has not perhaps committed itself against applying a different or more liberal rule when the special circumstances or equities of the case demand such a course, the general rule is as just stated; and I am unwilling in this case and at this late date to depart from it, besides I am of the opinion that under the circumstances that usually attend the administration of railroad properties by courts through receivers, the rule stated is a wise and salutary one. It would not do to charge the income of mortgaged railroad property managed by a receiver, or the property itself, with every debt incurred in all its previous history for labor, supplies or equipment."

After observing that the six months rule finds support by analogy in the statute of Illinois giving a lien upon railroad property for labor and supplies, the court continues:

"It may be added that the grounds upon which

the court may charge the income of mortgaged railroad property earned during the receivership with debts for labor, supplies and equipment received prior to the appointment of the receiver, are so fully stated in some of the cases cited.—particularly in *Fosdick vs. Schall*—that further discussion of them is unnecessary, but I will say that the six months rule was observed by me at the circuit, when disposing of the case of *Trust Co. v. Railway Co.*, and the final decree, so far as it rested upon that rule, was not disturbed by the Supreme Court.”

In the case of *Central Trust Co. v. East Tennessee R. Co.* 80 Fed. 624, decided by Judge Lurton of the 6th circuit in 1897, a claim for certain supplies furnished a railroad more than six months before the receivership was presented and refused. It was shown by claimant that net earnings had been diverted to the payment of interest on mortgage debts and to the improvements. Answering the claimant’s demand that it be paid out of the corpus of the property to the extent of such diversion, the court said:

“In this circuit a six months rule has been almost universally imposed and a large number of insolvent railroad companies have been wound up and their property distributed among creditors under general orders so limiting the payment of such claims * * * as these receivers were appointed January 24, 1892, it will be noticed that this limitation was practically one of six months; January 1, 1892, being fixed as a date more convenient to adjust said claims, than one falling so near the end of the month and of a year as a date precisely six months before the receivership. The appellants present no special circumstances which will justify a departure from this general order under which all such claims have been settled. We feel altogether in-

disposed to arbitrarily extend the limit imposed in the sound discretion of the Circuit Court.”

In the case of the *International Trust Co. vs. Townsend & Co.*, decided by Judge Lurton in the 6th circuit in 1899, 95 Fed. 850, *supra*, the claim was presented for building a pier and certain drawbridge abutments. In refusing the claim the court said:

“If on this statement of facts this debt be regarded in the ordinary business of operating a railroad and in the expectation that it would be paid out of the current earning of the railroad, only such of the debt as accrued within six months prior to the appointment of the receiver should have been held as a charge upon the surplus income of the receivership * * *

In this circuit six months has been generally regarded as a sufficient time to go back and charge such claims upon the income of a receivership, and this court gave its approval to that rule in the case of *Belknap vs. Trust Co.*, 47 U. S. App. 663 and 80 Fed. 624. There was no reason for departing from the time limit under which the court had administered this receivership.”

It will be observed in this case also that the rule was stringently applied to a claim, a part of which was for labor.

In the case of *Guaranty Trust Co. v Galveston City R. Co.*, 107 Fed. 311, decided by Judge Toulmin of the 5th circuit in 1901, three claimants who had furnished supplies admittedly necessary to the continued operation of the railroad were refused upon the ground that the supplies had not been furnished within six months of the receivership.

We submit that an examination of paragraph 2 of the stipulation herein will show that not only the character of the claim, but the circumstances under

which it accrued, were very similar to those of the case above referred to. In both instances all the materials had been furnished more than six months previous to the receivership, the most of the indebtedness was evidenced by promissory notes coming due after the appointment of the receiver and there was a small running account which had accrued shortly previous to the receivership, unevidenced by any notes.

We also call attention to the case of *State Trust Co. v. Kansas City R. Co.*, 129 Fed. 455, decided by Judge Phillips of the 8th circuit, 1904. The claim here urged was that of the Westinghouse Co., for having supplied the railroad with air brakes. It will be here observed that there had been a diversion of current income for the betterment of the railroad property. It will be observed also that the improvement here made was rendered necessary under an Act of Congress. The supplies in question were furnished more than a year previous to the receivership. The court had extended the period of priority to one year. Notwithstanding the diversion of current income, and the character of the supplies and the necessity for their use, the court refused priority to the claim. We call special attention to the language of the court, p. 458:

“The period of six months is ordinarily recognized by the Federal Courts as just and reasonable time within which a claim must have accrued, to entitle it to preference over the mortgage; and while it is not an inflexible rule, and the court may reserve to itself to allow a longer time where the equities of the case absolutely demand, there certainly *ought to be some special equity to give this particular alleged lienor an*

extension beyond the six months period recognized in paragraph 6.

“Speaking for myself, who joined with Judge Thayer in making the decree in question, the twelve months period was deemed most liberal to the creditors. And, as this court knows that all the claims imposed upon the purchaser of this road have been adjusted upon the twelve months limitation period, it can see no special equity in favor of this intervenor who represents the last unadjusted claim, having accorded to it, as the Master has, a period of 18 months anterior to the appointment of the receiver, even if the claim should be found entitled to the preference asserted.”

In *Moore vs. Donahoo*, 217 Fed. 177, the Circuit court of appeals of this circuit recognized the six months rule, though it was not apparently in controversy.

In *Title Insurance Co. vs. Home Telephone Co.*, 200 Fed. 263, the rule was recognized in this district although it was not in controversy in that case. In that case also this Court disallowed the claim of the president of the company for salary during the six months because it was not a current expense.

In reviewing the whole field of decisions, it may be safely said that not only has a six months preferential period been acknowledged and followed by the Supreme Court but by every Circuit of the United States. It may further be safely said that of the numerous learned judges who have applied the doctrine, only Judge Caldwell of the 8th circuit has, as evidenced by his decision in *Farmers Loan & Trust vs. Kas. City, etc., R. R. Co.*, 53 Fed. 182, and in *N. P. Ry. Co. vs. Lamont*, 69 Fed. 23, shown himself to be a consistent opponent of the doctrine.

The overwhelming authority in all of the United States circuits and in the Supreme Court, is that regardless of how well a certain claim may stand the test of priority otherwise it cannot in the absence of special equities be allowed if it has accrued more than six months previous to the receivership. The claim here urged has no stronger evidence in its favor than scores of other urged and disallowed in the numerous decisions above noted. If the claim of the Crane Company is allowed a preference notwithstanding the fact that all of it, except a part so small as to be unconsidered, arose more than a year ago and by far the largest part of it more than two years ago,—then it may as well be regarded as the law that secured claims must give way to unsecured claims. If the reason of the rule is as stated by Judge Brewer in *Blair v. St. Louis*, 22nd Fed. 471, that in the ordinary course of business large corporations cannot transact their business with such promptness that it is reasonably to be expected that their current bills will be paid as promptly as is the case with individuals, and that six months is ample for most large corporations, then in this case, where the corporation compared to that in most is a very small one, the rule would certainly not be enlarged. If the reason of the rule is as suggested by Judge Sanborn in 137 Fed. 40, *Westinghouse vs. Kansas City R. R.*, that in six months ordinarily interest will become due and the bondholders can assume that claims otherwise entitled to preference but not enforced within that time have waived their rights of priority,—then in this case where the bondholders had proceeded with utmost promptness to enforce their rights, there can be no reason for extending the doctrine.

VII.

It is not settled whether the doctrine is applicable to water companies.

The Court will observe from the facts submitted that the material was furnished by the appellant for purposes in connection with the water works and to a very small extent for the gas works. In determining whether the doctrine applies to this case at all, it is of course immaterial that the Washington-Oregon Corporation was engaged in other lines of endeavor.

At best for appellant it can be said that the question whether the doctrine applies at all in the case of water companies, is unsettled.

Short in his *Law of Railway Bonds and Mortgages*, page 594, says:

“But there are other corporations, the position of which with respect to the doctrine is, in the present state of authorities, somewhat difficult to fix. That no preference will be granted to back claims against a waterworks company is settled—a doctrine which seems to involve the conclusion that the power to exercise the right of eminent domain is not a decisive test.”

In *Wood v. Garanty Trust Co.*, 128 U .S. 418, 32 L.Ed.472, the Supreme Court of the United States was urged to extend the doctrine of railroad mortgages as expressed in *Fosdick v. Schall*, to a company supplying a municipality with water. The court refused so to do, Mr. Justice Larmer pointing out that “the doctrine of *Fosdick v. Schall* has never yet been applied to any case except that of a railroad.”

In *Ford v. Central Trust Company*, 70 Fed. 144,

the Court, in deciding against the priority of unsecured claims against a waterworks company, observed that the doctrine as laid down in the Fosdick case had not yet been applied to corporations furnishing a municipality with water. After declaring that the Fosdick case and other railroad cases were not controlling, the court continues:

“We recently had occasion to show that the doctrine of these cases had never been applied to any case except that of a railroad. *Hannah v. Trust Co.*, 70 Fed. 2. Assuming, *but not deciding*, that the doctrine of this case is applicable to a corporation under obligation to furnish a city and its inhabitants with water, still the appellant cannot maintain his claim for the following reason,” etc.

In *Louisville & N. R. Co. v. Memphis Gas Light Co.*, 125 Fed. p. 97, a mortgage was being foreclosed upon properties of a corporation furnishing a municipality with gas. Here again the Federal Court evidenced its reluctance to extend the doctrine to such corporations as water and gas companies. In citing *Wood v. Guaranty Trust Co.* to the effect that the Fosdick case had never yet been applied in any case save that of railroads, the court observed that “This probably still remains true of the Supreme Court,” although some Federal Courts had come to extend it to street railways, telegraph and telephone companies. The court then added:

“Obviously street railroads and telephone and telegraph companies are similar to railroad companies in a sense gas companies are not. A gas company is more like a waterworks company, which is more of a private concern,—a manufacturing enterprise. It supplies the public convenience but it does not enjoy the same privi-

leges and franchises nor would its stoppage result in that injury to the public and detriment to the mortgage security which would flow from the stoppage of a railroad.”

As late as 1909 the Court in *Whelan v. Etnerprise Transportation Co.*, 175 Fed. 214, referred to the refusal of the United States Supreme Court in *Wood v. Guaranty Trust Co.*, to extend the doctrine to water companies, as leaving such extension still “an open question.”

There is no decision of the United States Supreme Court, therefore, so far as we are aware, which has extended the doctrine in question to water companies.

The effect of this state of law is not impaired by the fact that the water systems to which the present supplies were furnished, were but branches of the Washington-Oregon Corporation. The properties of such corporation remain at all times separate and distinct. The supplies at most benefitted the water systems only. The power systems and railway systems operated by the corporation remained unconcerned and unbenefitted.

VIII

THE EQUITIES OF THE CASE

The frequent allusions of appellant's counsel to the equities of this case induce us before closing our argument to refer very briefly to this subject.

In his discussion of the equities, beginning at page 54 of his brief, counsel refers to the case of *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123. He states:

“The claim there allowed was for money borrowed that was used in the construction of a

building for the purpose of engaging in an entirely new enterprise.”

This statement is an error. The money was used for the construction of a new building in order to add to the power (p. 132). Counsel further states that the man who loaned the money “agreed in the terms of the loan that he should not be paid out of the current revenue until other indebtedness was paid.” We cannot find in the statement of the case or in the opinion anything on which this statement is based. There was an express agreement that the money was to be repaid out of the current revenues (p. 126). The new building effected a saving of \$4,000 per annum in the operations of the company. It was a distinct benefit to the concern. We do not think that the equities of the case at bar are nearly so appealing as those of the *Doud* case, just referred to, or of the *Rodgers Ballast Car Co.* case, found at 154 Fed. 629, and referred to by counsel on page 57 of his brief, or the case of *Toledo v. Hamilton*, 134 U. S. 296. In fact if there are any special equities in this case, any reason at all why the appellant should be paid over the other general creditors, whose claims amount to more than fifty thousand dollars, they have not been pointed out.

Under this head counsel apparently abandons his contention that the materials furnished by Crane Company were for current expenses. He says that “the materials that were furnished by Crane Company went into and formed a part of the mortgage security not only greatly enhanced the value thereof but in many instances actually reviving security that had become valueless,” etc.

Further on page 55 counsel says: “Here the ma-

terials of the intervenor can actually be identified in each instance and are invoiced in the inventory at the present time as part of the corpus of the mortgaged estate.” The actual theory on which the Crane Company hopes to recover is that (as it claims) the materials furnished by it improved, bettered and added to the value of the mortgage security, as distinguished from constituting current supplies necessary to keep the concern an operating one. As has been shown by the adjudicated cases, particularly those from the Supreme Court of the United States, cited under head “II” of this brief, it is entirely clear that the mere fact, if it is a fact, that the plant of the Washington-Oregon Corporation was bettered furnishes no reason whatever for allowance of preference. That is not the theory on which preferences are allowed.

But counsel says on the same page, fifty-four, while these materials were being furnished the bondholders took sufficient from the current funds of the corporation to have paid Crane Company in full * * “While Crane Company was putting materials into the corpus of the estate for the preservation of the property which inured to the benefit of the bondholders, the bondholders in turn were reaching into the pockets of the corporation and taking money which in equity and good conscience belonged to the intervenor.”

The record shows that the last interest received by the bondholders was in October, 1913. There is no showing that the bondholders had any knowledge that the company was in default in payment of any of its bills at that time. The Washington-Oregon Corporation failed to pay its interest maturing on

the first of the following April. Under the terms of the mortgage foreclosure was not possible for ninety days, that is until the 1st of July, 1914, and within thirty days thereafter the bondholders began foreclosure and asked and obtained the appointment of a receiver. We would like counsel on the argument of this case to point out wherein the bondholders were guilty of any wrong in this conduct. Counsel has stated that "the diversion during the time that this account was accruing was so flagrant as to almost impute bad faith to the bondholders." This statement should not have been made if counsel has no basis for it, and if he has a basis for it in the record we would like to have him point it out explicitly to the Court.

During this period the appellant received almost nine-tenths of its account and the bondholders received no part of the principal of their claims, but did receive interest at six per cent. up to October, 1913. It is not charged by us that Crane Company was guilty of any wrong in receiving money which was justly due to it from the Washington-Oregon Corporation, but Crane Company having received nearly all of its principal ought not to assert that the bondholders were guilty of any wrong in receiving their interest.

Had Crane Company pursued its proper remedy with diligence as it was required to do under the principle of the cases which we have cited, it would either have collected its money or a receiver would have been appointed long before one was appointed. Appellant would not have been asking the equity of the court for a claim nearly three-fourths of which is more than two years old. It was not equitable for

the appellant to allow the Washington-Oregon Corporation to continue to operate leaving unpaid its debts to the Crane Company without effort on the part of the Crane Company to collect and now claim that the income earned during the period of the receivership should be applied to the exclusion of the bondholders upon its payment.

On the one hand we have the appellant, which has sold goods to the Washington-Oregon Corporation with the expectation of obtaining a commercial profit; and, on the other hand we have the bondholders who loaned money to the Washington-Oregon Corporation with the expectation of receiving only the interest upon their money. On the one hand, we have the appellant, which was induced by the hope of obtaining liberal profit to extend credit to the Washington-Oregon Corporation and on the other hand we have the bondholders who declined to advance any money on the credit of the Washington-Oregon Corporation but looked solely to the security of a mortgage upon all of the then owned and after acquired property of the corporation, and the income thereof. On the one hand we have the appellant which allowed its claim to run for years; and on the other hand we have the bondholders, who, within one month of the time when their right to foreclose had accrued, had instituted a foreclosure suit. On the one hand we have the appellant which has presumably made a profit, or has suffered no loss, from its dealings with the Washington-Oregon Corporation; and on the other hand we have the bondholders who have suffered a very heavy loss on their investment.

Indeed, if Crane Company is to receive a prior-

ity over the bondholders, we see no reason why all the unpaid creditors of the Washington-Oregon Corporation should not be accorded a simliar priority; for presumably the materials furnished by, or through the aid of, all these creditors (and their claims amount to many thousands of dollars) meet the test of priority contended for by appellant's course. We are therefore brought to the astonishing conclusion that the position of the unsecured creditors is superior to that of the secured creditors.

We submit that the appellant must fail because its materials do not constitute operating supplies; further, because they were furnished to the water branch of the Washington-Oregon Corporation's business; further, because they were not furnished within the time preceding the receivership within which the courts hold that priority claims must accrue; and, finally, because there is no special equity by virtue of which the claimant has the right to be preferred over other claims and over the contract rights of the bondholders.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CRANE CO., a Corporation
Appellant

VS.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

Reply Brief of Appellant

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MAY 29 1916

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Reply Brief of Appellant

FACTS RESTATED.

It should not be necessary to allude to the facts again, but there are some statements made by counsel that are erroneous, and I cannot permit them to go unchallenged. On page 4 of the brief the statement is made that in some instances it was agreed between the intervenor and the Washington-Oregon

Page Two—

Corporation that the payments made should be applied on specific items. There is positively nothing in the record that would justify such a statement. On pages 6-8, counsel's brief, the word "*betterment*" is used quite indiscriminately and generally in this form, "a betterment made necessary, etc." If it were made necessary, it should be classed under the head of essential repairs and equipment and not "betterments." Betterments, as the term is used, means permanent improvements that are not necessary to the business of the corporation. The statement is made that it is not known whether some of the materials were used at all. Evidently counsel has not read the stipulation of facts. It is stipulated that *all* of these goods became a part of the property covered by the appellee's mortgage. At the bottom of page 7 the statement is made that Exhibit A-4 was used in the connection with the S., P. & S. extension. The stipulation proves that statement an error. Counsel is also in error in making the statement that Exhibit A-8 was used on new or old mains. I do not deem it necessary to go through counsel's statement of facts and review each item. It would perhaps be the best and most satisfactory method for the court to ignore the statement of both parties as to the nature of the materials and resort to the stipulation, where it will be found that they are fully described and characterized. All of the goods for which we are claiming, it will be noted, were used, counsel's statement to the contrary notwithstanding. (Stipulation, Sec-

tion XIII, Tran., 56.) All of the goods furnished, as disclosed by Exhibits B-1 to B-18, inclusive, were used for the purposes set forth in my original brief. I have rechecked these items, and can give no better explanation than will be found under the second subdivision of my original argument. The classification submitted by the appellee is his interpretation of the stipulation. In giving my classification I used as near as possible the language of the stipulation, and will submit to the court the final interpretation.

Before reviewing the cases I desire to call the court's attention to a statement made on page 10 of the appellee's brief to the effect that they would show by authorities submitted that service connections were extensions and not subject to preference. I fail to find that they have in any way verified this statement.

ARGUMENT ANSWERED.

Before replying to the argument of counsel, and in order to set the court right in the event it has been misled by the unverified statements of counsel, let me summarize the situation presented in this case. That there may be no misunderstanding or misconception of the basis upon which Crane Co. rests its claim, I will briefly restate what is here admitted to be the concurrent facts:

1. There was a diversion of the current income prior to the receivership in an amount exceeding Crane Co.'s claim. (Trans., 57.)

2. At the time of the receivership there was in the hands of the Washington-Oregon Corporation sufficient moneys arising from the net income to have paid Crane Co.'s claim in full. *This fund went into the hands of the receiver.*

3. There was a sufficient net income arising from the receivership to have paid Crane Co.'s claim in full. (Trans., 79.)

4. The materials furnished by Crane Co. went into and formed a part of the properties covered by the mortgage. (Trans., 56.)

5. The materials furnished were necessary to the making repairs and such additional equipment as was necessary to meet the conditions precedent to the renewing and enjoyment of the franchises under which the corporation operated.

6. The materials furnished by Crane Co. increased the value of the mortgaged security. This is not denied.

7. The materials furnished were necessary to conserve the properties covered by the mortgage. (See Stipulation of Facts and Exhibits.)

8. The materials furnished were necessary to the conduct of the business of the corporation, which is the rule announced and adhered to by this court in the case of *Moore v. Donahoo*.

9. The materials were sold by Crane Co. in the reliance that they would be paid for out of the current income of the corporation. (Trans., 55.)

The above propositions are not only abundantly established by the stipulations, exhibits and plead-

ings, but are virtually admitted by the appellee, and were so found by the trial court. To further clarify the situation, let me again restate the theory of allowance as stated by this court in the case of *Moore v. Donahoo*:

“Such equity as he may have flows from the fact that in the ordinary course of business he has performed labor and furnished necessary supplies to the railroad company with the reasonable expectation of being paid therefor from certain funds. * * * The real basis upon which the preference rests is thought to be the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto.”

Furthermore, it must not be forgotten that the current income has been held by this court and by the Supreme Court to be a trust fund for the benefit of just such creditors as Crane Co. (Cases cited in Appellant's Brief, page 32.) Therefore, if the cases cited by appellee are to govern, the facts should be somewhat similar, at least. Otherwise they must fall in the class designated by counsel as “dictum” and “general statements.”

There is no proposition, I take it, that can be properly demonstrated by dealing separately with its component parts. In other words, you cannot take a case that has considered the question of diversion alone, or a case that has considered the question of classification alone, or a case that has

considered the question of time alone, and offer them separately to prove a result of the union of the three. Therefore, unless, as I said before, we can find a case that has in it a combination of facts similar to those hereinbefore stated, the opinion cannot furnish a criterion for the decision here.

I will review the cases which he has cited for the purpose of showing the court the utter inapplicability. The case of *Kneeland v. American Loan Co.*, 136 U. S. 96, it appears, is one of the pivotal cases cited by counsel, and they seem to repose great confidence in the comments of the court, in spite of the fact that just prior thereto we find them admonishing this court against the acceptance of the doctrine announced in *Fosdick v. Schall*, because of it being mere *obiter dictum*. Upon an inspection of the *Kneeland* case, we find that there was no diversion and no surplus earnings; that this swayed the court in its final conclusion is indicated at the beginning of the opinion by the use of the following language:

*"It is important to note these facts: First, this case is not embarrassed by any matter of surplus earnings. * * * Second, the receivership was at the instance of a judgment creditor. * * * It was not at the instance of the mortgagees nor were they seeking a foreclosure. Third, the rolling stock for which preference was asked was not included in the sale, but was returned to the intervenor upon the order entered prior to the sale."*

The court did use the language quoted by counsel after stating the above facts. All of these facts which did not exist in the *Kneeland* case exist here, and the plain intimation is that had such facts existed the court's conclusion would have been otherwise.

The case of *Thomas v. Western Car Co.*, 149 U. S. 96, is another case cited by counsel and is a favorite of those seeking to defeat preferential claims. Let us see what the facts were there. (1) The claim was for car rentals under a conditional contract of sale, whereby title remained in the car company; (2) the court found that the cars were not furnished in reliance that the rentals would be paid out of the current income. That was obvious from the fact that they were sold on a title retaining contract, wherein the payments were designated as rentals; (3) the officers of the intervenor and the defendant corporation were practically the same; this was the first point considered by the court; in fact, it was the decisive feature; (4) there was no diversion and no surplus net income, either before or during the receivership. Time and time again have mortgagees sought to show that the *Thomas* and *Kneeland* cases repudiated the doctrine of *Fosdick v. Schall*, but each time the Supreme Court has stated emphatically that the doctrine announced in *Fosdick v. Schall* is still adhered to. (See *Vir. & Ala. Coal Co. v. Ry. Co.*, 170 U. S. 355.) As far as this case is concerned, the portions quoted in counsel's brief from the decision

are *dictum* of the clearest kind. That the case is absurdly inapplicable is apparent.

Counsel refers to the case of *Virginia & Alabama Coal Co. v. Ry.*, 170 U. S. 355, as endorsing the *intimations* contained in *Kneeland* and *Thomas* cases. With all due deference to counsel, this case does not in any way approve either the *Kneeland* or *Thomas* case. They do not disapprove it, as there was no cause for doing so, the facts being entirely different. This case, however, is most favorable to appellant's contention, and I respectfully urge the court to read it. Here it will be noted that a receiver was appointed on *March 4, 1892*. A claim was made for coal which had been furnished a year or more previous to this time for operating locomotives. It also was shown that a portion of the coal was used during the receivership. *The claim was allowed out of the income of the receivership.*

As counsel takes occasion to refer to betterments quite frequently, it might be well to call the court's attention to what the Supreme Court has defined as betterments. In the *Miltenberger Case*, 106 U. S. 286, five miles of road was constructed. This was considered necessary to facilitate the conduct of the business. It was an extension within the interpretation of appellee, yet the court allowed the claim notwithstanding. If in that case a preference would be allowed for five miles of new railroad, where the other equities were not nearly as strong as exist in this case, how can this court

avoid allowing a preference for water mains laid under precisely the same conditions?

In *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 462, the court defines betterments as follows:

“Materials could not be considered betterments where * * * the improvements made by the receiver no more than made up for the deterioration of the road, especially in view of its imperfect construction and inferior material from the beginning.”

In this case ties, new rails, turntables, foundation, bridges and fences were held under the above definition not to be betterments. I cannot see the distinction between this class of material and the materials furnished by Crane Co., and I submit that counsel has not pointed out the difference in his argument.

It seems unnecessary to answer the comments on the case of *Moore v. Donahoo*, 217 Fed. Rep. 177, yet I hesitate to allow the statement to the effect that this court approved the six months' rule to go uncontradicted. The court did refer to the preferential claim period, but what was clearly intended by that reference was the preferential period adopted by the referee, which, in that particular case, was six months. It is to be noted, however, that six months included practically all of the claims. The former holding of this court in the case of *N. Y. Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.* was not in any way disturbed, and

it is clear in that case that the six months' rule was not applied, although the question of time was directly in issue.

Inasmuch as the appellee impresses upon the court the applicability of the case of *Ill. Trust & Sav. Bank v. Doud*, 105 Fed. Rep. 149, it would be well to give some attention to the facts in that case. In the first place, we find that the intervenor made a loan to the company on the agreement and understanding that it would not be paid out of the income until after the improvements had been paid for out of the current income. The improvement had not been paid for at the time of the receivership. Hence, according to the understanding between the parties, he was not entitled to payment. *There was furthermore no diversion of the current income shown. Neither was there a surplus on hand.* Furthermore, this case was decided upon the theory that in order to permit a preference, a showing should be made that the goods furnished were necessary to keep the road a going concern. This theory has not been approved in later cases, and is specifically repudiated by this court in *Moore v. Donahoo*, the proper query being, "were the goods necessary to the business of the road?" The learned judge in the *Doud* case did review many decisions of the federal courts, but the deductions drawn from those cases I submit are not warranted by the facts. In any event, the conclusion of the *Doud* case is predicated upon a wholly different state of facts. It was found, furthermore, in the *Doud* case that the money

loaned was to build an extension not necessary to the business of the road. In fact, it was to engage in an entirely new enterprise. Neither was the money loaned on the understanding that it would be paid out of the current income.

The statement is further made by counsel that this case refused to apply the doctrine of preference, on the theory that the goods were necessary to maintain the franchise. How any such a conclusion can be reached by a reading of the opinion is beyond my comprehension, as it holds nothing of the kind. Counsel takes occasion, in commenting upon this case, to refer to the holding in *Fosdick v. Schall*, and particularly to that portion quoted in my original brief as *dictum*. The *Doud* case is the only case that I am able to find where the holding of the Supreme Court is denominated *dictum*. Evidently the Supreme Court does not so consider it, because in the later case of *Burnham v. Bowen*, 111 U. S. 776, we find the court using this language:

“We do not now hold, any more than we did in *Fosdick v. Schall*, * * * that the income of a railroad in the hands of a receiver for the benefit of the mortgage creditors can be taken away from them and used to pay the general creditors of the road. *All we then decided*, and all we now decide is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable with the restoration of the fund which was improperly applied to other use.”

Here we have the Supreme Court literally explaining and interpreting what they had previously decided. This should silence all remarks on the question of *dictum* as referring to the case of *Fosdick v. Schall*. But to go still further and take the quotation from the *Doud* case, appearing on pages 25 and 26 of counsel's brief, I assert that Crane Co. can qualify under that holding. Counsel seems to think that the *Doud* case held that the fact that the materials furnished aided to conserve and improve the property and increase the security was immaterial. Again I assert that the case holds nothing of the kind. I admit that that fact in itself would not be sufficient, but that it is important in connection with other facts is established beyond question by the authorities. (See *R. I. Locomotive Works, et al., v. Trust Co.*, 108 Fed. Rep. 5, hereinafter reviewed.)

The case of *Rodger Ballast Car Co. v. R. R. Co.*, 154 Fed. Rep. 629, another opinion by Judge Sandborn, is clearly not in point, for the following reasons:

1. No diversion was shown and no surplus income. It was a question of payment out of the *corpus* of the estate.

2. The holding did not go any further than to say that the claim was not entitled to preference *out of the corpus*.

3. The court clearly found that the ballast cars were not necessary to the business of the road, and in that particular I believe the court was right.

True, the railway commission had insisted upon them fixing up their road. Ballasting the road might have been necessary, but to expend a large amount of capital for ballast cars for the purpose of doing the ballasting was not necessary to the business of the road. If you consider the holding in the light of the facts, it is not antagonistic to the position taken by *Crane Co.*

The case of *State Trust Co. v. Kansas City*, 129 Fed. Rep. 455, was another case decided in the same circuit in which Judge Sandborn was sitting. One of the first things considered was whether the filing of the mechanic's lien was not a waiver of a right of intervention. While the point is not clearly decided, yet, according to other opinions by the Supreme Court and other courts, a filing of a mechanic's lien is a clear waiver of the equitable right of intervention. (Foster's Federal Practice, Vol. I, page 970.) Furthermore, the bill of intervention was not filed until after the decree had been rendered, and the decree specifically provided that no claims would be allowed that had not accrued within one year. In the order allowing the intervenor to file his petition he was subjected to this portion of the decree. His claim accrued more than eighteen months prior to the receivership.

The case of *Rhode Island Locomotive Co. v. Continental Tr. Co.*, 108 Fed. Rep. 5, a case reviewed by counsel, is authority for the proposition that the fact that the materials increased the value of the security should be taken into consideration in de-

termining the preference. To use the court's language:

"The fact that the materials augmented the security held by the mortgagees is an element to be considered in determining preference."

The facts in this case are so clearly distinguishable from the facts in the present case that it could not furnish authority for a decision here even if the opinion held as counsel states, but it does not so hold. One of the first points considered by the court and which was especially reported by the referee was the fact *that there had been no diversion and no surplus income*. Furthermore, the locomotives were not sold in reliance that they would be paid for out of the current income. That this was an important feature considered by the court is indicated by the language of the opinion, as follows:

"If the appellant is to obtain any relief, it must show, first, that the demand here prosecuted was not a debt created upon the personal credit of the company; * * * second, *that there are current earnings now applicable to such debts of income*, or that there had been a diversion of the current earnings either before or since the receivership which the mortgagees should equitably release."

The court, of course, found against the intervenor. The decision clearly intimates, however, that had the facts been otherwise, the preference would have been allowed. I might add that all of the facts which did not exist in that case are ad-

mitted here. Therefore, on the holding of this case a preference should be granted. The court did not hold, as counsel say, that the locomotives were an addition to the equipment and not a current operating charge. It held that the locomotives were an addition of permanent equipment, and that there *was no showing that they were necessary to the business of the road.*

In the case of *Lackawanna Ry. Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 306, the first point considered by the court and found by the master was that there had been no diversion of the current income and no surplus income applicable. Furthermore, the intervenor had collateral security for his claim, thus clearly showing that he did not rely upon payment out of the current income. It will further be noted that in this case the time within which the claim accrued was sufficient to take in the whole claim of intervenor here, *yet that point was not referred to as a reason for denying the claim.*

The case of *Central Trust Co. v. Colorado Co.*, 200 Fed. Rep. 85, is distinguishable in the following particulars:

1. The case was decided upon a question of pleading. The intervenor based his petition upon an oral contract between himself and the defendant company, whereas the proof showed a written contract between the defendant company and the Parker Boiler Co., for which intervenor acted as

agent. The court, therefore, held that the cause of action was not in intervenor.

2. There was no diversion shown, and that point was specifically mentioned as follows:

“There is nothing alleged or proven showing as against the bond holders any equity in claimant, *as, for instance, that during the progress of the repairs or thereafter there was any diversion of the net income.*”

This case, therefore, holds that a diversion or the surplus net income creates an equity in favor of the claimant. Again I am at a loss to understand how counsel can put forth the case of *City Trust Co. v. Sedalia*, 195 Fed. Rep. 845, as supporting his contention. An excerpt from the opinion at the outset clearly shows that the position taken by the court was in no way antagonistic to the position of the intervenor here. To quote:

“Unless such demands are based upon some statute of the state in force at the date of the making of the mortgage creating a prior right in the claimant, *or in case of necessary materials furnished which became a part of and directly enhanced the value of the mortgaged property itself in such sense as to render the sale of the mortgaged property, including the materials furnished, for the benefit of the security holders without payment for the materials so supplied, inequitable.*”

The facts held in this case to be necessary to the allowance of a preference existed here, namely:

There was a diversion, and the materials furnished became a part of and directly enhanced the value of the mortgage security. I find in this case support for my contention that the fact that the materials conserved the security is an important element in determining preference. One of the claims here allowed was in favor of the surety company that had become surety on a supersedeas bond on an appeal from a judgment rendered against the defendant, on the theory of the *Morrison* case. The court said:

“Surely this was such an act of protection of the security pledged to the payment of the bonds arising in operation of the property as in equity requires the casualty company to be paid in preference to the holders of the mortgage debt.”

There can be no doubting this language. It is clear and convincing, and inasmuch as it is one of counsel's own cases, it should be immune from the suspicion of *dictum*. And in this connection I will again comment on the *Morrison* case. By referring to the opinion in the *Morrison* case, it will be seen that the court denominated the equity of the intervenor a strong one, yet its only strength laid in the fact that the act done by Morrison conserved the assets of the corporation, which inured to the benefit of the mortgage bondholders.

The case of *Central Trust Co. v. Colorado Co.*, 200 Fed. Rep. 85, was submitted as proving that a claim for furnishing and installing boilers was

disallowed on account of classification. While that is true, yet the situation presented as a reason for the declination shows the utter inapplicability of the opinion. The boiler was a part of the *original construction*. It had never been used in the business and was held by the court not to be necessary in the business. Furthermore, the petition was held to be insufficient, and a variance existed between the proof and the contract set out. This was the first and major reason for disallowing the claim.

The case of *Toledo Ry. v. Hamilton*, 134 U. S. 290, was where a dock was constructed. This dock was new and had not been used in the conduct of the road, neither was it essential to its business. I am not contesting with counsel the question as to whether or not *original construction* will form the basis of a preferred claim. This case and the following case of *Porter v. Pittsburg, etc., Steel Co.*, 120 U. S. 649, are cited as proving that it is immaterial that the work done tended to conserve the railroad or enhance the property. What these cases in fact decided is that this fact *in itself* will not furnish grounds for preference, especially where the other equities are against the intervenor.

The case of *Reyburn v. Consumers' G. L. & F. Co.*, 29 Fed. Rep. 561, would seem to me to need no comment. The gas meters for which preference was asked were part of the original construction of the company. The company had never been in operation prior to the furnishing of these meters. Under such a state of facts, there is no question that a

preference would not lie. That this was the decisive feature is indicated by the following language:

“They are all for construction material, such as meters, pipes and other material, which was used in the construction of the works, and *not in their operation after they were constructed.*”

Counsel states that the *Reyburn* case is on all fours with the case at bar, especially with reference to the connections, pipes and fittings. That this statement is error is apparent. All of the goods furnished by Crane Co. was after the construction had been completed and during the operation of the company. The *Reyburn* case, furthermore, is authority for the proposition that the doctrine of preference will be applied to other than railway companies.

In the subdivision V of counsel's brief he attempts to interpret the stipulation on the question of diversion. I am impressed with the fact that counsel could not have read this stipulation carefully, otherwise he could not have so misconceived its import. This stipulation not only states that a diversion actually took place, but that there are and were sufficient funds on hand to have paid Crane Co. I cannot concur in the statement that diversion implies something wrong. It is possible for one to get possession of another's property without committing any wrong. It is in the retention and refusal to give it up that constitutes the inequity. On page 44 of the brief counsel again misstates my

position. I am not contending and have not contended that any one feature would enable us to have a preference. It is the concurrence of all of that that establishes the preference. Counsel on page 45 makes the statement that there were general creditors to the amount of \$50,000. This statement is absolutely *dehors* the record, and it is unfair, as I am in no position to concur in or refute the statement. The stipulation eliminates such a statement, and had this been true, and as important as counsel seems now to consider it, he surely would have added it to the stipulation. Were I desirous of going outside of the record, I would add in addition that a settlement was made with all of the other creditors. But we are trying this case on the facts presented in the record, to which I will confine myself strictly and ask that counsel be compelled to do likewise.

The case of *Westinghouse v. K. C. Southern*, 137 Fed. Rep. 26, is another case of Judge Sandborn, and is wholly inapplicable, because of the difference in the facts. It is clear that Judge Sandborn has in the opinions circumscribed the limits of intervening creditors more than any other court, and it is for that reason that in reviewing cases counsel hesitated to depart very far from that circuit. The comment of counsel on the case of *N. Y. Guaranty & Indemnity Co. v. Tacoma Ry. Co.*, 83 Fed. Rep. 367, to the effect that the time within which the claim accrued was less than a year, is inaccurate. The rule which counsel has been attempting to

apply is the date when the goods were furnished. If you are to take the time of accrual of debt rather than the date the goods were furnished, then I submit that the date of accrual of Crane Co.'s claim was on the date the account was stated between them, on June 1, 1914. There is no evidence that the amount for which we are now claiming was due prior to that time. But by examining this case it will be noticed that the court does not put any such construction upon it as counsel would have the court believe.

The case of *Bowen (Bound) v. Railway Co.*, 58 Fed. Rep. 473, was not decided on the question of time at all. The decisive feature was that the intervenor did not look to the current earning for payment. Furthermore, no diversion occurred. Interest was paid, but it was with the knowledge and consent of the intervenor. In other words, the intervenor waived his claim and permitted the interest to be paid. True, time was mentioned, but not until after the court had refused the claim on other grounds.

Counsel makes the statement that the six months' rule was applied in the case of *Thomas v. Peoria Ry. Co.*, 36 Fed. Rep. 819. The six months' rule was not applied in a case anywhere analogous to the present situation. No diversion was shown in that case. The court, furthermore, gives as its reason for applying the six months' rule was that it found support in the statutes of Illinois. If, as it appears in that case, the laws of Illinois were a

decisive factor by analogy, the case of *Bellingham Bay Imp. Co. v. Fairhaven, etc.*, 49 Pac. Rep. 514, should be decisive here. Furthermore, in the above case the court stated with emphasis that the intervenor was not entitled to any equitable consideration, because the stockholders and officers of the intervenor company were practically the same as the railway company, and that the contract upon which the preference was based was an unconscionable one and an imposition upon the stockholders.

The case of *Thomas v. Cincinnati*, 91 Fed. Rep. 795, is submitted as having applied the six months' rule against labor claims. To begin with, the case does not so decide. There was no diversion shown^{or any surplus was},

It was decided upon the fact that the intervenors were not in court with clean hands and were not entitled to ~~or any surplus income. Furthermore, the case was~~ any equitable consideration. An excerpt from the opinion will suffice to show this:

"The claims in question were presented at the suggestion of the auditor of the receiver by the receiver's counsel, with the approval of the court."

It was shown further that the real parties in interest were not the intervenors at all. In fact, the real owners were perhaps deceased. This was the decisive point. To have allowed a claim under such circumstances would have been inequitable and would have prostituted any court of equity. Counsel refers to the case of *Finance Co. v. Charleston R. R.*, 52 Fed. Rep. 678, and quote in italics a

portion to the effect that the courts have expressly refused to recognize claims less than six months prior to the appointment of the receiver (Appellee's Brief, page 54). The appellee has disqualified this case by his own admission that the courts have applied more than a six months' rule. But when we inquire into the facts of this case we find that the claim was for an attorney fee for work done in the legislature to try to pass a law to validate bond which had already been invalidated by the courts. Furthermore, at the time these services were rendered there was no road in existence. How could such a claim qualify under any of the rules of equitable preference? It would seem to me that if the intervenor could even get by a demurrer on such a claim as this, that in itself would furnish a precedent for allowing the Crane Co.'s claim in full.

In the case of *National Bank of Augusta v. Carolina R. R. Co.*, 63 Fed. Rep. 25, quoted for the purpose of substantiating the six months' rule, it will be found that no diversion was shown. Furthermore, the claimant was the president of the road, who had in charge its full management and was responsible in a large measure for its insolvency. The case was not decided on the question of time, but on the question that under such circumstances the president was not entitled to any priority. Notwithstanding the statement of counsel, no question of time was considered in the case of *International Trust Co. v. Townsend Brick Co.*, 95 Fed. Rep. 850,

a claim was disallowed on the theory that it did not form operating expense or maintenance.

Counsel quotes at length from the case of *Central Trust Co. v. East Tennessee R. Co.*, 80 Fed. Rep. 624 (Appellee's Brief, page 56), prefacing the quotation by stating that the court was considering the application of the six months' rule where it was shown that the net earnings had been diverted to the payment of interest on mortgage debts and improvements. I do not find that this case presented any such question; in fact, no diversion was shown, and this was one of the first points considered. To use the court's language, "The question as to whether there had been a diversion * * * was principally one of fact, and was referred to a special commissioner who reported *that there had been no such diversion.*" We find, furthermore, in the opinion the court held that while there was no established six months' rule, that the six months' rule had generally been applied in that circuit. But the court clearly indicated that if the circumstances were different and the equities of the complainant plain, a six months' rule would not be applied. There was no showing furthermore that the materials were necessary to the business of the road.

In the case of *State Trust Co. v. Kansas City Ry.*, *supra*, which is also offered to establish a six months' rule, the court uses language which clearly rejudiates counsel's statement, when applied to this case. The facts as I have heretofore shown are so utterly different, that even had the case so held,

it could not control here. But the case actually holds in substance that there is no rigid six months' rule, and that the equities of the particular case control the time.

The case of *The Title Insurance Co. v. Home Telephone Co.*, 200 Fed. Rep. 263, does not decide what counsel claims for it, and is so outside of the issues here presented that I will not even take the time to review it.

Counsel conclude their examination of the authorities covering the question of time with the statement that the overwhelming authority is to the effect that a claim will not be extended over the six months' period. If the authorities are so overwhelming and the cases so numerous, it is quite strange that counsel do not at least examine one case in point. I have reviewed all of the decisions commented upon by counsel and wherever the facts approach the facts presented in this case, the court has inferentially sustained my position. A case to be an authority must decide the proposition involved on a state of facts that would at least include the point in controversy. If, as appears in many of the cases cited by counsel, the intervenor fails to bring himself within the well-known equitable rules and procedure, a court of equity will always find some way to deny relief. If, on the other hand, as appears here, where the claimant has shown himself in every way entitled to equity, and where the mortgagee has placed itself in a position where it has sought equity without even the pretense of

doing or offering to do equity, the court should compel it to do that which is its clear equitable duty.

The position taken by counsel, that if the court is to allow this claim,

“We are therefore brought to the astonishing conclusion that the position of the unsecured creditors is superior to that of the secured creditors,”

is narrow and illogical. If they are sincere in that statement it is because, for some reason or other, they are unable to comprehend the theory upon which preferential claims are allowed or the necessity of conforming to equitable maxims when asking equitable relief. They further fail to take into consideration the fact, as held by the decisions, that when accepting the security the mortgagee impliedly agrees that the creditors shall be paid out of the income. In summing up the equities, counsel absolutely ignore practically all of the vital elements necessary to preference. If no diversion had taken place, and if there were not at the time the receiver took charge of the properties current net income sufficient to have paid Crane Co.'s claim, and which went into the hands of the receiver, or if the bondholders, outside of the fact that they came into possession of money that should have been used to pay our claim, had not actually profited by what Crane Co. furnished, and had the materials Crane Co. furnished not actually gone into the mortgaged property, there might have been some cause for com-

plaint. Counsel says the bondholders have suffered a loss on their investment. There is no suggestion of that kind anywhere in the record. On the contrary, if you will compare the value of the property with the bonds outstanding, they were paid in full. Had they not been paid in full, that fact would have been stipulated in the record, as counsel was very acute in not overlooking any facts that would help their cause. In any event, the bondholders are responsible largely to Crane Co. for what they received. Counsel have extreme difficulty in keeping in mind the fact that the mortgage creditors are actually in possession of money which should have been devoted to the payment of our claim, and which is more than sufficient to pay it. Paying back money that never belonged to you cannot be called a loss. If I were to find another's pocket-book and subsequently be compelled to relinquish it or to pay back the money contained in it, would I be justified in calling that a loss? My inability to retain it might be a misfortune, but I could not regard it as a loss.

As I have previously stated, counsel take up separately the propositions necessary to constitute a preferential claim, and after determining that neither one separately is sufficient to justify a preference, conclude that the existence of all concurrently would not be sufficient. If that is not an example of a *non sequitur*, then I am much mistaken in my judgment. Neither hydrogen or oxygen constitute water, yet the union of hydrogen and

oxygen constitutes water. In taking up these several propositions the court will observe, by reference to my brief, that I attempted to show, and I believe I have shown, that all of the essential features exist in this case. As my purpose has been in this brief to answer merely the argument and citations of counsel, I do not care to weary the court by repetition. It has been my object to present the facts in the case and the law applicable in such a way that the equities of appellant would become apparent. That each case to a large measure must be decided upon its own peculiar equities, is a point upon which we must agree. Feeling, as I do, that the appellee and the mortgage creditors have greatly benefited by the materials furnished, and that they have taken into their hands money which should have been devoted toward the payment of this claim, I am firm in my conviction that the prayer of the intervenor should be granted.

Respectfully submitted,

MAURICE W. SEITZ,
Solicitor for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation,
Appellant,

vs.

FIDELITY TRUST COMPANY, Trustee,
a corporation, and WASHINGTON-
OREGON CORPORATION, INDEPEND-
ENT ELECTRIC COMPANY, a cor-
poration, and WILLIS D. HOAG,
Appellees.

No. 2768

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASH-
INGTON, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF OF APPELLEES

MAURICE W. SEITZ,
Solicitor for Appellant.

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
F. D. METZGER,

Solicitors for Appellees.

E. M. HAYDEN,
of Counsel for Appellees.

IN THE
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No. 2768

On the argument of this case appellant asked time to submit a reply brief. On objection by the solicitors for the Fidelity Trust Company, based upon the fact that to permit a reply brief to be filed subsequent to the argument would permit counsel to make statements or produce arguments which the appellees would have no opportunity to meet, the Court granted fifteen days to the appellees to answer any reply brief which might be submitted by the appellant.

THE FACTS.

Counsel insists that the statement contained in our brief,—that it is not shown whether all of the materials were used,—is not accurate and calls attention to the stipulation, wherein it is said that all of the goods furnished by appellant became a part of the property covered by the appellee's mortgage. The stipulation will have to stand for itself in this regard.

In a number of places referred to in our classification, pages 9 to 18 of our brief, the detailed statement as to the various items contains such remarks as:

“ * * we have no record or means of ascertaining whether they were actually used prior to the sale of the gas plant, or whether a part was sold with the gas plant. Stipulation A-1.”

Further on:

“All of these goods involved in the Crane Company's account which were used at Vancouver, except goods referred to in Exhibits A-6 and A-20, were first placed in stock and then were taken from stock as occasion required. In the above statement, unless otherwise noted in the Stipulation, it is not known whether the goods were all used prior to the receivership. Stipulation, Exhibit A, p. 6.”

See also Exhibit A-11.

The stipulation, taken as a whole, seems to mean that all of the goods furnished by the intervenor became a part of the mortgaged property, but some of it was not actually put into use, but was carried in stock. The most favorable view for the intervenor is that some of it was not put into use until after the appointment of a receiver.

Counsel's statement, beginning on page 3 of his brief, of the “admitted” facts, is not correct in the following particulars:

1st. We do not admit that there was a diversion of the current income prior to the receivership in an amount exceeding Crane Company's claim. This statement of appellant is predicated upon the stipulation, found on page 57 of the Transcript, in which it is admitted that:

“ * * there were actual operating net earnings in excess of the interest of the Washington-Oregon Corporation due and paid by the Washington-Oregon Corporation during said period on the first and consolidated mortgage bonds covered by the present foreclosure suit and in excess of Crane Company's claim; and that if the intervenor Crane Company is held by the court to be in the class of priority claimants and otherwise entitled to priority in enforcing its claim, the intervenor shall be decreed to be entitled to its claim.”

The foregoing is not an admission that there was any diversion of any income. Whether the failure to pay intervenor constituted a diversion must depend upon whether intervenor was entitled to payment in preference to the payment of interest to the bondholders or in preference to other payments which were made. That is one of the questions to be decided.

2nd. We do not admit that at the time of the receivership there was in the hands of the Washington-Oregon Corporation sufficient moneys arising from net income to have paid Crane Company's claim in full. Neither is it admitted that *any* such fund went into the hands of the receiver. We do not understand on what portion of the record this statement is based, but it must be some misconception. Counsel does not support this statement with any reference.

3rd. It is admitted that the materials furnished by Crane Company went into and formed a part of the property covered by the complainant's mortgage in the sense hereinbefore stated.

4th. The statements under the head “5,” on

page 4, cannot be admitted. Our contentions as to this statement embrace the major part of our original brief.

5th. The statements under figures 6, 7 and 8 are conclusions drawn by the appellant from the facts which are admitted.

On page 19 counsel again says that the stipulation states that diversion actually took place. We have heretofore, under the head "1st," quoted what the stipulation does say. Whether a diversion took place or not depends upon whether counsel is right in his contention of the respective right of the bondholders and of the claimants. There was no diversion if, as we think, the bondholders had a higher claim to their interest than the appellant had to its principal.

It is contended that the statement made on page 45 of our brief, that there were general creditors to the amount of \$50,000, is *dehors* the record, and that the statement is unfair. In paragraph VI of the Amended Petition, page 29 of the Transcript, it is said:

" * * reference is hereby made to the original complaint on file herein for the specific allegations thereof, describing said property and setting out the default of the said Washington-Oregon Corporation, a corporation therein, which said allegations of said complaint are hereby made a part of this petition."

Paragraph XVI of the amended petition says:

"The said Washington-Oregon Corporation is insolvent."

The original bill of complaint, to which reference is

made in the petition, alleges in the seventeenth paragraph, after stating the default of the Washington-Oregon Corporation in the payment of taxes, and in the payment of interest due July 1st, 1914, on the second mortgage, and the interest due April 1st, 1914, on the first mortgage, states:

“ * * that the Washington-Oregon Corporation has defaulted in the payment of principal and interest of due and outstanding bills payable, exceeding the sum of \$250,000; that the said Washington-Oregon Corporation has defaulted in the payment of accounts due and payable exceeding the sum of \$100,000; that the creditors of Washington-Oregon Corporation are numerous * * ” (Supplemental transcript p 25).

In the amended bill of complaint, it is stated in paragraph twenty-three:

“* * that Washington-Oregon Corporation defaulted in the payments of accounts due and payable exceeding the sum of \$50,000.” (Transcript p 18).

We do not know what counsel means when he says that the stipulation “eliminates” such a statement. There is nothing in the stipulation which is capable of being construed to mean that we are not at liberty to refer to the facts alleged by the petitioner.

The further statement, that counsel would, if he desired to go out of the record, say that a settlement was made with all the other creditors, should not be taken seriously. If counsel should make such a statement as that he would be making a statement which is not capable of proof, because it is not true.

Counsel says on page 21 that there is no evidence that the amount which Crane Company are claiming

was due prior to the date of the execution of the notes. This statement of counsel is an inadvertence. *Each of the statements of account attached to the stipulation of facts filed November 8, 1915, show that the goods were sold for cash.* Various payments were made prior to the time notes were given (Am. Pet. VIII, tr. p 30). The present suggestion that the accounts were not due prior to the time of the execution of the notes is inconsistent with the entire record of the case.

THE CASES.

There must, of course, be an end of argument, and we will not trouble the court by again reviewing or attempting to summarize the holdings of the various courts. There is so much variance between counsel's interpretation of the cases and that of appellees, that only this court can determine what the decisions actually are. However, we think it necessary to refer to one or two cases again reviewed by the appellant.

In the *Miltenberger* case, 106 U. S. 286, referred to on page 8 of the brief of appellant, the five miles of new road for which preference was allowed *was constructed by the receiver in a case wherein the first mortgagee was a party* and the first mortgagee was held bound by his conduct.

In the case of *Union Trust Company v. Illinois Midland Ry. Co.*, 117 U. S. 434, 462, the trustee of the bondholders was a party to the litigation. The materials for which claims were made were *furnished to the receiver*. Priority was allowed, based upon negligence of the trustees in failing to object.

In the case of *Rodger Ballast Car Co. v. R. R.*

Co., 154 Fed. 629, it seems that counsel is in error in holding that there was no diversion, at least as that term is used by counsel in both his briefs. On page 631 it appears that the receivers "expended \$63,000 surfacing the Quincy road and paid out \$101,483.52 for rentals, but they paid no part of the purchase price of these cars."

See also in the case of *Lackawana Ry.Co.v.Farmers Loan & Trust Co.*, 176 U. S., 298, 306, cited on page 15 of the reply brief, there was a diversion, if the payment of interest on the mortgage debt and if the making of permanent improvements to the exclusion of the payment of the claim which was the subject of litigation amounts to a diversion. In the statement of the case found on page 480 of volume 44, Lawyers Edition, and on page 309 of the official edition, it appears that the receivers expended under the orders of the court outside of operating expenses over a million and a half dollars, of which three-quarters of a million was interest on first mortgage bonds. However, since the expenditures on which the claim of the Lackawana Company was based were expenditures for construction the court did not allow a preference. Counsel's statement regarding this case is also inaccurate in so far as he says that time was not considered an element in determining the equities. The court in this regard says:

"Besides the rails in question were delivered long before the railroad company had made any default in the payment of interest, about sixteen months before the company's property was put into the hands of a receiver and about five and one-half years before the appointment of a receiver in this cause."

Further on the court says:

“Under all the circumstances, including the amount of the debt and the long period of credit, the claims in question must be regarded as general unsecured debts,” etc.

Reyburn v. Consumers' G.L. & F. Co., 29 Fed. 561. This case is cited by us upon the proposition that gas meters were considered as a part of the original construction, and we think the case sustains the contention made by us in our original brief that the service connections are a part of the construction of the plant, as distinguished from repairs. We do not think it at all material whether the meters are put in in connection with the construction of the whole plant, or are put in from time to time as service connections are made. The point of the decision is that the plant is not complete until the meters are in, and that is equally true in the case at bar.

We think that an examination of many of the other cases referred to in the reply brief will show that the statements of counsel regarding them are inaccurate, but we believe that there is no profit in further discussion of the meaning of the courts, since this court will in any event examine the cases themselves.

We are confining ourselves in this memorandum to calling the court's attention to what we believe to be inaccuracies of statement either as to the facts or as to the decisions of the courts. We do not feel at liberty to go into the case generally, and refer to our original brief as to all points not herein discussed. Respectfully submitted,

RANDOLPH W. CHILDS,
MAURICE A. LANGHORNE,
FREDERIC D. METZGER,

Attorneys for Appellees.

E. M. HAYDEN, *Of Counsel.*

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation,
Appellant,

VS.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees.

APPELLANT'S PETITION FOR REHEARING

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

MAURICE W. SEITZ,
Solicitor for Appellant,

RANDOLPH W. CHILDS, MAURICE A. LANGHORNE,
F. D. METZGER,
Solicitors for Appellee.

Filed

SCHWAB PRINTING COMPANY

JAN 3 - 1917

F. D. Monckton,
Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE COMPANY, a Corporation,

Appellant,

vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,

Appellees.

APPELLANT'S PETITION FOR REHEARING

Crane Company, intervener and appellant, respectfully petitions the court to grant a rehearing in this cause upon the following grounds:

First: The court in its majority opinion held that "the payment of interest to bondholders entitled to payment of interest in priority to the claims of creditors claiming is not a diversion." While I am somewhat in doubt as to what the court intended to

convey by this language, the import, when applied to the facts recited, is, that the payment of interest on bonded indebtedness to the exclusion of current indebtedness is not a diversion within the meaning of that term as defined in the adjudicated cases on the subject. I maintain that the court fell into an error in making this statement as it has been specifically held that the payment of interest on the bonded debt to the exclusion of current creditors constitutes a diversion. Supporting this are the following cases:

Burnham v. Bowen, 111 U. S. 776.

C. & A. Ry. Co. v. U. S. & Mexican Trust Co.,
225 Fed. Rep. 941.

Clark v. Central Ry. & Banking Co., 66 Fed.
Rep. 805.

Clyde v. Richmond & D. R. Ry. Co., 56 Fed.
Rep. 541.

Central Trust Co. v. Power Co., 200 Fed. Rep.
89.

Southern Ry. Co. v. Carnegie Steel Co., 176 U.
S. 285.

*International Trust Co. v. Townsend Brick
Co.*, 95 Fed. Rep. 850.

Furthermore in this case it is not necessary or essential to find a diversion in order to entitle the appellant to preference, as the stipulation entered into by the parties specifically eliminates that question by stating that if the appellant is otherwise entitled to preference, its claim should be allowed.

Second: The opinion further recites that “Crane Company stands, we think, as a creditor which sold goods to the Washington-Oregon Corporation, with the expectation of realizing profits as in ordinary commercial transactions.” This is in direct conflict with the stipulated facts. It was in substance stipulated between the parties that these goods were sold in the reliance that they would be paid for out of the current income, and for that reason Crane Company permitted the account to continue, thinking and believing that the current income was being so applied.

Transcript of Record, Paragraph IX, page 55.

It therefore seems to me that this point should have been accepted by the court as an established premise.

Thrd: The court further held that Crane Company showed “no special equity upon which they can rest their claims.” This finding I submit, with all due deference to the court, is not warranted by the stipulated facts in the case or by the holdings of the federal courts on the subject.

In the case of *Union Trust Co. v. Morrison*, 125 U. S. 611, the court held Morrison’s equity a strong one “by reason of the protection afforded the property and assets of the railroad company.”

In *Clark v. Central Ry. & Banking Co.*, 66 Fed. Rep. 805, the court held the equities especially favorable to the intervenors because “it appears that there

was a diversion of the income *by the payment of interest on bonds* * * *.”

In the case of *Central Trust Co. v. Colo. Light & Power Co.*, 200 Fed. Rep. 89, the court held that a diversion of the net income of the plant to the payment of interest or for permanent improvements *would create an equity in favor of unpaid claims of material men.*

In the case of *Gregg v. Metropolitan Trust Co.*, 197 U. S. 182, the court intimated that had a diversion occurred to the benefit of the secured creditors it would have constituted an equity in favor of the intervenor. To the same effect is the case of *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 273.

I respectfully urge the court to review the above decisions with this point in mind, when it will be seen that what was held to be special equities in those cases are all consolidated in this case, viz: (1) A surplus net income out of which appellant's claim can be paid. (2) Diversion of current income to the payment of interest on bonded debt. (3) Materials furnished by Crane Company which inured to the benefit of the mortgage creditors and constituted a portion of the property which was sold under the foreclosure sale. (4) The goods furnished conserved the mortgaged estate and enhanced the value thereof.

Fourth: The holding of the court on the classification of the appellant's claims is not, I submit, in accordance with the stipulation of facts or the established doctrine.

In the parent case of *Fosdick v. Schall*, the supreme court's classification was for "necessary operating and managing expense, proper equipment and useful improvement." This has not been changed by any later holding of the supreme or federal courts, if you will take into consideration the facts of the particular case.

The case of *Gregg v. Metropolitan Trust Co.*, *supra*, which the court cited as governing, states the same doctrine only in a different form. "To enable the railway company to operate as a continuing business."

In the case of *International Trust Co. v. Townsend Brick Co.*, *supra*, the court defines it as "necessary operating and managing expense." This court in the case of *Moore v. Donahoo*, 217 Fed. Rep. 184, allowed claims for "operation and maintenance."

I submit that if the court will but consider the business of the company, namely, to furnish water, and the means by which this was accomplished, or could be accomplished, it will see the utter impossibility of continuing the business without the necessary equipment to connect its customers with the mains.

In addition to this there is a considerable portion of the claims presented which is stipulated to be for repairs, but the court apparently made no distinction. If a denial of appellant's claims are to be placed upon that ground, it should have the benefit of this distinction.

Fifth: The court in its majority opinion did not pass on the question as to whether the Washington law as laid down in the case of *Bellingham Bay Imp. Co. v. Fairhaven Ry. Co.*, 49 Pac. Rep. 514, should govern or whether it was pertinent. In view of the decisions cited on that question by Judge Gilbert, in his dissenting opinion, I maintain that we are entitled to the application of the law as laid down in the Washington case referred to, and to have that question passed upon.

Sixth: The court in its majority opinion, while holding that the appellant was not entitled to preference out of the *corpus of the estate* did not pass upon the question as to what appellant's rights were with respect to the *net income of the receivership*. The stipulation of facts shows that at the close of the receivership *there was a net income in the hands of the receiver amounting to \$23,091.44.*

Transcript of Record, page 79.

In the case of *Gregg v. Metropolitan Trust Co.*, *supra*, upon which the court seemed to place much reliance, an entirely different conclusion would have been reached had there been either a diversion or a surplus income in the hands of the receiver. Nay, more, the supreme court in that case held practically that the right of an intervenor under the circumstances here presented, to an allowance, out of the income of the receivership, is a conceded fact. To quote the exact language:

“It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question, is not before us.”

The opinion of this court as expressed in *Moore v. Donahoo, supra*, is in full accord with this holding as indicated by the following language:

“If, as is thus held, the *current income* constitutes a trust fund and if the mortgagee in taking his security impliedly agrees that labor and material men may first be paid out of the funds before he has any claim thereto, and if one performs labor or supplies materials *in reliance upon this understanding*, it follows as a matter of course that he has a right which a court of equity may assist him to enforce.” * * *

The same reasoning and theory is adopted in the following cases:

Va. & Ala. Coal Co. v. Ry. Co., 170 U. S. 365.

Fosdick v. Schall, supra.

International Trust Co. v. Townsend Brick Co., supra.

Clark v. Richmond & D. R. Ry. Co., supra.

So. Ry. v. Carnegie Steel Co., supra.

I respectfully urge the court to examine the cases above cited with reference to this particular point, as I feel confident the court will find that an entirely different rule applies and should apply where there is a *net income* out of which claims may be paid and should have been paid. The theory underlying the

Page Eight—

doctrine is that the mortgage creditors are, under no circumstances, entitled to anything out of the income until the current bills are paid, and if by any indication or otherwise the secured creditors succeed in getting possession of these earnings to the exclusion of the creditors, restitution will be made in an appropriate proceeding.

For the foregoing reasons therefore I respectfully ask the court to grant a rehearing of this case, particularly upon the points suggested, and if the court deems it advisable, upon the whole case in order that ample justice may be done between the parties.

Respectfully submitted,

MAURICE W. SEITZ,
Solicitor for Appellant.

State of Oregon, County of Multnomah, ss.

I, Maurice W. Seitz, solicitor for the appellant, and petitioner, Crane Company, do hereby certify that I have read the opinion of this court in this case, dated December 4th, 1916, and the dissenting opinion of Judge Gilbert filed on said date; that I prepared the foregoing petition for rehearing.

I further certify that in my judgment said petition is well founded, and it is not interposed for delay.

MAURICE W. SEITZ,
Solicitor for Appellant.

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United States Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COM-
PANY, a corporation,

Appellee.

No. 2773

Transcript of Record

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

MET. PRESS. SEATTLE

Filed

MAILED 1915
F. D. Monckton,
Clerk



United States Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a corporation,

Appellant,

vs.

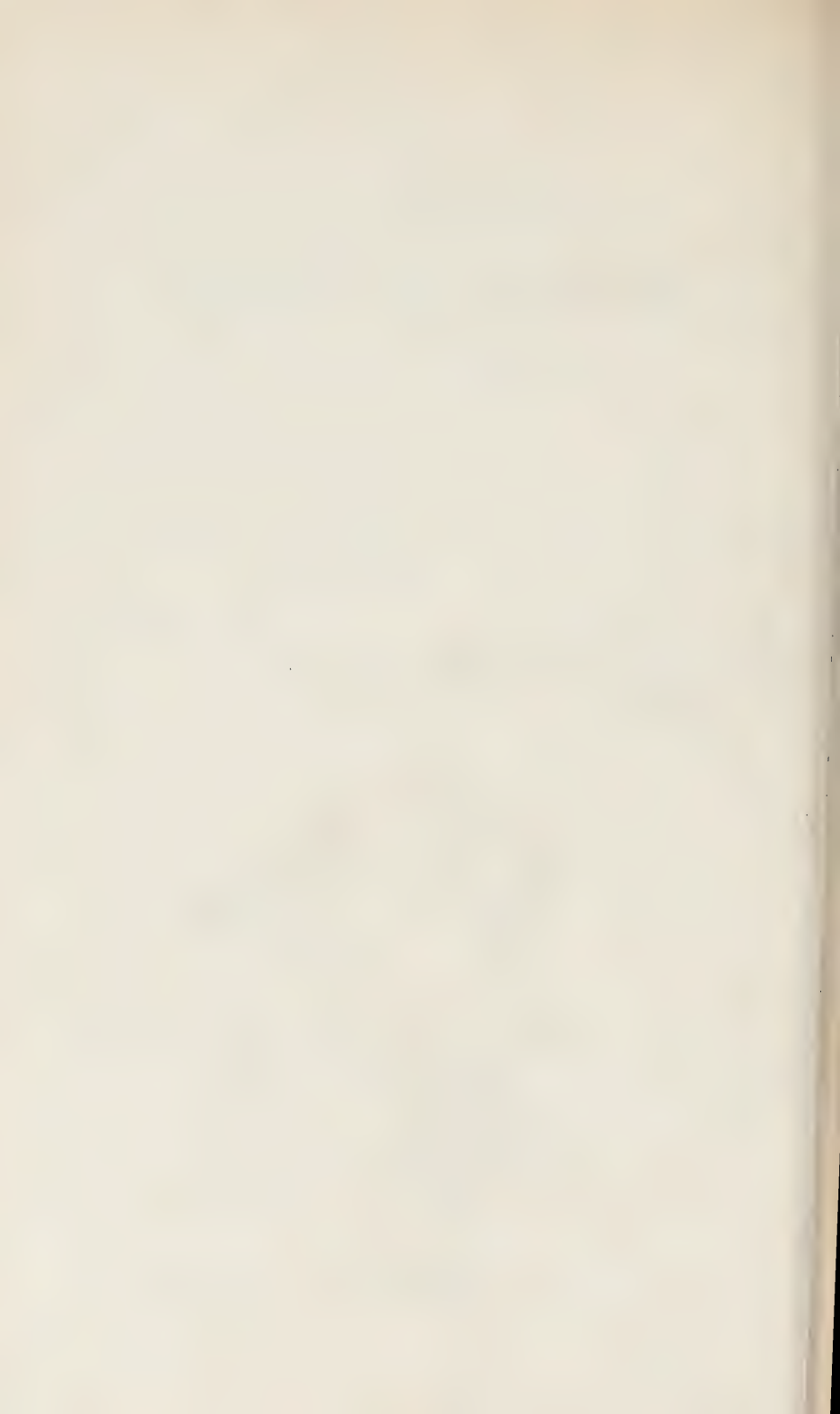
NORTHWESTERN COMMERCIAL COM-
PANY, a corporation,

Appellee.

No.-----

Transcript of Record

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
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NAMES AND ADDRESSES OF COUNSEL.

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653 Colman Building, Seattle, Washington,
Attorney for Appellant.

WILLIAM H. BOGLE,

609 Central Building, Seattle, Washington,

CARROLL B. GRAVES,

609 Central Building, Seattle, Washington,

FRED T. MERRITT,

609 Central Building, Seattle, Washington,

LAWRENCE BOGLE,

609 Central Building, Seattle, Washington,
Attorneys for Appellee.

STATEMENT.

Time of commencement of suit: March 29, 1912.

Names of Parties to suit:

Maine Northwestern Development Company, a corporation of the State of Maine, plaintiff and appellant.

Northwestern Commercial Company, a corporation of the State of Washington, defendant and appellee.

Dates of filing respective pleadings:

Amended Answer, filed March 17, 1913.

Motion to Strike From Amended Answer, filed February 24, 1913.

Opinion Denying Motion to Strike First Affirmative Defense, filed March 25, 1914.

Order Denying Motion to Strike Affirmative Defense, filed March 26, 1914.

Third Amended Answer, filed September 24, 1914.

Plaintiff's Demurrer to Third Amended Answer, filed December 31, 1914.

Opinion on the Demurrer to the Third Amended Answer, filed January 21, 1915.

Order Overruling Demurrer to Third Amended Answer, filed January 25, 1915.

Amended Complaint, filed July 31, 1915.

Amended Answer to Amended Complaint, filed September 20, 1915.

Motion to Strike Third Affirmative Defense of Answer, filed October 2, 1915.

Order Granting Motion to Strike Third Affirmative Defense to Amended Answer to Amended Complaint, filed October 7, 1915.

Reply, filed October 25, 1915.

Deposition:

Depositions of Edward A. Pierce and James E. Mamter taken upon notice, at Portland, Maine, April 12th and 13th, 1915;

Deposition of Edward A. Pierce, taken upon notice at New York, N. Y., April 19th, 1915;

Deposition of William H. Rust, taken by stipulation of date July 1, 1915.

Time of Trial: Nov. 23, 24, 26, 30, Dec. 1, 1915.

Verdict of Jury: Filed Dec. 1, 1915.

Final Judgment entered: Dec. 2, 1915.

Citation on Appeal: Date of issuance, March 8, 1916. Date of service, March 8, 1916. Date of filing, March 9, 1916.

In the United States District Court, for the Western District of
Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Amended Answer.

The defendant comes, and for its amended answer to the complaint herein, alleges:

I.

It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs numbered I, II, III, IX and X of said complaint.

II.

It denies each and every allegation contained in paragraphs numbered V and VI of said complaint.

III.

It denies that there is now due and owing from defendant to the plaintiff the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00) together with interest thereon from March 12th, 1912, on any subscription to preferred stock of plaintiff, or on any other account whatever, and it denies that there is due and owing from defendant to plaintiff any sum whatever on any account.

And for a further and first affirmative defense to said complaint, defendant says:

I.

That at the time of the alleged subscription to the capital stock of said plaintiff, the John Rosene described in Exhibit "A" attached to the complaint herein, was the promoter and managing director of plaintiff, and was at the same time also president of this defendant. That the said Rosene as such promoter of the plaintiff company, and by virtue of certain contracts and agreements entered into between the promoters of said plaintiff company and the said John Rosene, and entered into between the said Rosene and the said plaintiff company, was personally interested in procuring subscriptions to the preferred stock of the plaintiff company. That the said John Rosene had no authority to make any subscription contract for or on behalf of this defendant for any of the shares of the

preferred stock of said plaintiff company, either as its President or otherwise, and that if any such subscription contract was signed by said Rosene purporting to be on behalf of this defendant company, it was without the knowledge or consent or authority of this defendant, and was made by him in furtherance of his personal interest in the plaintiff company, and to benefit himself as a promoter and contractor therewith, and at a time when he was its managing director—all of which was well known to said plaintiff at the time.

And for a further and second affirmative defense to said complaint, defendant says:

I.

That on or about the 20th day of September, 1907, the said plaintiff, acting by and through its managing Director, one John Rosene and its Treasurer and a Director, one Arthur A. Houseman, in consideration of the waiver and release by said defendant of any right to repudiate payments to plaintiff theretofore made aggregating One Hundred Twenty-five Thousand Dollars (\$125,000.00) for shares of stock of said plaintiff, which payments had been so made without authority of said defendant, and the waiver by said defendant of any right to recover from plaintiff said sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00), or any part thereof, orally waived, released and discharged this defendant from any liability to said plaintiff for or on account of said alleged subscription contract pretended to have been made by the said Rosene on behalf of this defendant and pleaded in said complaint.

And for a further and third affirmative defense, defendant says:

I.

That in the certificate of organization of said plaintiff company and in its By-laws, its capital stock was fixed at the sum of Six Million Two Hundred Fifty Thousand Dollars (\$6,250,000.00), divided into five hundred thousand (500,000) shares of the par value of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) of preferred stock, and seven hundred fifty thousand (750,000) shares of the par value of Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00) of common stock. That the whole number of the said preferred shares of the capital stock of said plaintiff corporation has never been taken, issued or subscribed for; nor has the whole number of said common shares been either taken or subscribed for.

WHEREFORE, defendant prays that said complaint may be dismissed and that it may go hence without day and recover from the plaintiff its costs and reasonable disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

State of Washington, County of King.—ss.

C. A. McMasters, being duly sworn, states: That he is the Secretary of the Northwestern Commercial Company, a corporation, defendant in the above entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the statements therein are true.

C. A. McMASTERS.

Sworn to and subscribed before me this 15th day of February, 1913.

(Notarial Seal.)

F. F. MERRITT,

Notary Public in and for the State of Washington,
residing at Seattle.

Service of within Amended Answer this 15th day of Feby., 1913, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Amended Answer: Filed in the U. S. District Court, Western Dist. of Washington, Mar. 17, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the United States District Court for the Western District of
Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Motion to Strike From Amended Answer.

Comes now the above named planitiff and moves to strike from defendant's amended answer herein as follows:

First: All of the first affirmative defense in said Amended Answer contained on the following grounds:

(1) That so much thereof as alleges want of knowledge, con-

sent or authority of defendant to make the subscription contract pleaded in the complaint, does not constitute new matter;

(2) That so much thereof as alleges that John Rosene was promoter and Managing Director of Plaintiff Company and at the same time President of this Defendant Company, and as such promoter, by virtue of certain contracts and agreements alleged in said affirmative defense, was personally interested in procuring subscriptions to the preferred stock of plaintiff company in furtherance of his personal interest and to benefit himself as promoter and contractor therewith, constitutes a defense cognizable, if at all, on the equity side of the Court;

Second: All of said first affirmative defense, excepting the words

“That the said John Rosene had no authority to any subscription contract for or on behalf of this defendant for any of the shares of preferred stock of said plaintiff company, either as its President or otherwise, and if any such subscription contract was signed by said Rosene purporting to be on behalf of this defendant Company, it was without the knowledge or consent or authority of this defendant”

commencing in line 14 and ending in line 20, page 2 of said Answer; and further excepting the words

“All of which was well known to said plaintiff at the time,”

commencing on line 23 and ending on line 24 of said page 2, on the following grounds:

That the allegations of said defense other than as excepted herein

- (1) are irrelevant,
- (2) constitute, if any, an equitable defense improperly merged and united with a legal defense.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of within Motion received this 24th day of February, 1913.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Motion to strike from Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 24, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

Maine Northwestern Development Company, Plaintiff,

v.

Northwestern Commercial Company, Defendant.

No. 2117.

Filed March 25, 1914.

On Motion to Strike an Affirmative Defense. Motion Denied.

William H. Gorham, for Plaintiff.

Bogle, Graves, Merritt & Bogle, for Defendant.

NETERER, District Judge.

This is an action upon an assessment levied upon subscribers to the stock of the plaintiff corporation. The plaintiff has moved to strike the following portion of the first affirmative defense of the defendant corporation:

"That at the time of the alleged subscription to the capital stock of said plaintiff, the said John Rosene described in Exhibit 'A' attached to the complaint herein, was the promoter and managing director of plaintiff, and was at the same time also president of this defendant. That the said Rosene as such promoter of the plaintiff company, and by virtue of certain contracts and agreements entered into between the promoters of said plaintiff company and the said John Rosene, and entered into between the said Rosene and the said plaintiff company, was personally interested in procuring subscriptions to the preferred stock of the plaintiff company . . . and was made by him in furtherance of his personal interest in the plaintiff company, and to benefit himself as a promoter and contractor therewith, and at a time when he was its managing director."

Plaintiff contends that the above constitutes an equitable defense and as such cannot be interposed in an action at law. Many authorities are cited by plaintiff to prove that the alleged action of the defendant's president was a breach of a fiduciary obligation, and thus that it amounts to fraud and cannot be pleaded as a defense in this action.

I cannot understand that the plaintiff seriously contends that fraud is always an equitable defense and may never be pleaded at law. The authorities cited are merely to the effect that a party when sued at law upon his own solemnly executed contract may not defend upon the ground of fraud unconnected with its execution. This holding is based upon the common law rule that a party to a

sealed instrument was bound by its recitals when it was introduced in a court of law, and could attack it for fraud only where such fraud was connected with the execution of the instrument in such a way as to render it not the deed of the party.

Hill v. Northern Pac. Ry. Co., 104 Fed. 754;

Pacific Mut. Life Ins. Co. v. Webb, 157 Fed. 155;

Levi. v. Mathews, 145 Fed. 152;

Hill v. Northern Pac. Ry. Co., 113 Fed. 914 (C. C. A.);

George v. Tate, 102 U. S. 564.

The proper procedure, according to these authorities, where the fraud relates merely to the consideration or inducement to contract is for the party defrauded to apply to a court of equity which might set aside the instrument upon such terms as might be deemed just, whereas a court of law would be limited to the validity or invalidity of the deed.

Hartshorn v. Day, 19 How. 211, 223.

But there is no such magic in the word "fraud" as to rob a court of law of jurisdiction, irrespective of the nature of the fraud charged. Where the fraud is of such a nature as to render the contract against public policy or illegal courts of law have universally refused to enforce it.

9 Cyc. 465.

To wave aside such a defense on the ground that it was a matter for equitable cognizance alone would be to make a court of law a potent agency in the accomplishment of illegal and unlawful designs.

Plaintiff's counsel occupies the unique position of asking the court to enforce a contract which he zealously contends is fraudulent; and to bring the defense pleaded by defendant within the meaning of the word fraud, he quotes good law and sound morals, neither of which are beyond the province of this court to recognize and enforce. From *Twin-Lick Co. v. Marbury*, 91 U. S. 587, he gleans the following:

"That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others."

He also incorporates in his brief the following from *Wardell v. N. P. R. R. Co.*, 103 U. S. 651:

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another, whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict of interest and duty; and 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' *Marsh v Whitmore*, 21 Wall, 183. The law therefore will always condemn the transaction of a party on his own behalf, when in respect to the matter concerned, he is the agent of others, and will release against them whenever their enforcement is seasonably resisted."

Plaintiff cites other authorities to bring such a defense as that here pleaded within the category of fraud. It is therefore unnecessary to discuss the effect of the facts pleaded upon the contract. While some respectable authority might be found to the effect that a contract made by the manager of one corporation with another corporation of which he is also manager is not wholly void and may be enforced where the party seeking its enforcement shows its fairness by clear and convincing proof (*Geedes v. Anaconda Copper Mining Co.*, 197 Fed. 860), yet where the party upon whom this burden is cast admits the fraud, it will hardly be contended that the contract should be enforced by a court of law or any other court.

2 Thompson on Corporations, Sec. 1242.

Of course such an admission is merely for the purposes of argument on the motion, but where the relationship pleaded is such as to throw upon the plaintiff as a matter of law the burden of showing absence of fraud, plaintiff's admission of fraud makes the defense which it moves to strike a perfect defense against its right of action.

Of agreements such as that here alleged, which tend to promote a breach of duty of persons who stand to others in a fiduciary relation, 9 Cyc. 474, says:

"While it is often said that such agreements are against public policy, because it is the policy of the law to secure fidelity in the discharge of their duties by all persons holding such positions of trust and confidence, yet it is more accurate to say that such agreements, tending to cause unfaithful conduct by fiduciaries, are illegal, because they are in effect agreements to wrong or defraud the persons whose interest the fiduciaries have in charge."

It would indeed be a harsh system of jurisprudence that would send any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements

which the other would abhor. Both are established to promote the well-being of society, and this may not be promoted by encouraging the violation of the most sacred duties known to the law.

Woodstock Iron Co. v. Extension Co., 129 U. S. 643;

West v. Camden, 136 U. S. 507.

It is unnecessary to discuss the other portion of the motion to strike.

The motion is denied.

JEREMIAH NETERER, Judge.

Opinion on denying motion to strike first affirmative defense. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 25, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States, for the Western District of Washington, Northern Division.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

No. 2117.

Order Denying Motion to Strike Affirmative Defense.

The above matter having come duly and regularly on to be heard before the Court, upon motion of said plaintiff to strike out certain portions of defendant's amended answer herein, and said motion having been duly submitted to the Court for consideration upon briefs of the respective parties herein, and the Court having duly considered said motion and the arguments of counsel thereon, and being fully advised in the premises, and having heretofore, and on March 25, 1914, filed its memorandum decision denying said motion:

Now Therefore, it is ordered that said motion be, and the same is hereby, in all things, denied. Exception noted.

Done in open court this 26th day of March, 1914.

JEREMIAH NETERER,
United States District Judge.

Indorsed: Order denying motion to strike affirmative defenses. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Mar. 26, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court, for the Western District of
Washington, Northern Division.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

No. 2117.

Third Amended Answer.

The defendant comes, and for its third amended answer to the
amended complaint herein, alleges:

I.

It denies that it has any knowledge or information sufficient
to form a belief as to any of the allegations set forth in para-
graphs numbered I, II, III, IX and X of said complaint.

II.

It denies each and every allegation contained in paragraphs
V and VI of said complaint.

III.

It denies that there is now due and owing from defendant to
the plaintiff the sum of one hundred twenty-five thousand dollars
(\$125,000) together with interest thereon from March 12, 1912, on
any subscription to preferred stock of plaintiff, or on any other ac-
count whatever, and it denies that there is due and owing from
defendant to plaintiff any sum whatsoever on any account.

And for a further and first affirmative defense, defendant says:

I. That at the time of the alleged subscription to the capital
stock of plaintiff company on behalf of this defendant by John
Rosene, shown in "Exhibit A" attached to the complaint herein,
said John Rosene had no authority to make any subscription to the
capital stock of plaintiff company for or on behalf of this defend-
ant, and such subscription, if made by said Rosene purporting to
act on behalf of this defendant, was made without the knowledge
or consent or authority of this defendant: that said Rosene, at the
time said subscription is alleged in said complaint to have made,
and prior thereto, was one of the promoters and managing directors
of said plaintiff, and had entered into certain contracts with other
promoters thereof and with said plaintiff whereby it was agreed,
among other things, that said Rosene, together with said other pro-

moters, would organize the plaintiff corporation, and that said Rosene would sell and convey to said plaintiff—when organized—certain alleged mining claims and water rights, and for which he was to receive, in part payment, the sum of two hundred and fifty thousand dollars; and was also to receive one million two hundred and fifty thousand dollars of the common stock of plaintiff for the benefit of himself and the said other promoters; that it was further understood and agreed, among other things, and as a part of said arrangement, that said Rosene would subscribe for preferred shares of stock of plaintiff on behalf of this defendant in said sum, and that the money realized on such subscription should and would be appropriated to the payment of said Rosene of said two hundred and fifty thousand dollars under said contract. That the said alleged subscription on behalf of this defendant, referred to in said complaint, was made by said Rosene pursuant to this agreement and understanding by him with said plaintiff and its promoters, and in furtherance thereof and of his own personal interests and those of said other promoters, and not otherwise. All of which was well known to plaintiff, and of all of which said facts this defendant was ignorant until after suit was commenced by plaintiff against this defendant on said pretended subscription.

2. That upon the organization of plaintiff company, said Rosene, pursuant to said agreement and understanding, did convey said mining claims of said plaintiff.

3. That said Rosene subsequently, without the knowledge or consent of this defendant, caused moneys of this defendant, aggregating one hundred and twenty-five thousand dollars, to be turned over to plaintiff on said alleged subscription, and said plaintiff turned said money over to said Rosene pursuant to the terms of the agreement and understanding hereintofore set out.

4. That immediately upon being informed that said alleged subscription had been made by the said Rosene purporting to act for this defendant, this defendant disaffirmed and repudiated the same and notified the plaintiff of its disaffirmance and repudiation thereof, and defendant has never at any time ratified, approved or adopted said subscription, but has at all times repudiated the same.

And for a second and further affirmative defense, defendant says:

1. It repeats all of the allegations contained in its first affirmative defense herein.

2. That on or about the 20th day of September, 1906, this defendant learned that said John Rosene, without its knowledge or consent, had turned over funds of this defendant to plaintiff

in the aggregate amounts of one hundred and twenty-five thousand dollars on said alleged subscription, which subscription had theretofore been disaffirmed by this defendant; that defendant, having a claim or right under the law and the facts, to recover from plaintiff said sum so received by it, the said plaintiff, acting by and through the said John Rosene, its managing director, and Henry W. Davis, its president, and Arthur A. Housman, its treasurer and a director, they being duly authorized to act for plaintiff in the premises, agreed and stipulated, orally, to waive and release, and did waive, release and discharge this defendant from any liability to plaintiff and from any further claim of any kind or nature, by plaintiff against defendant for or on account of said alleged subscription agreement, in consideration of the waiver and release by defendant of its right or claim of right to recover from plaintiff the said sum of one hundred and twenty-five thousand dollars so turned over to it from or out of the assets of this defendant as above stated.

3. That said agreement of settlement, mutual release and accord was accepted by plaintiff and acquiesced in for a period of more than three years, and no claim was made or asserted by it against this defendant of any kind whatever until the commencement of its first action against defendant in 1910.

That it had previously repudiated and disaffirmed said subscription agreement, and has constantly since said last named date repudiated and disaffirmed same and disclaimed any liability thereunder.

And for a further affirmative defense, defendant says:

The right of action of plaintiff herein did not accrue within six years prior to the commencement of this action.

WHEREFORE defendant prays that said complaint may be dismissed, and that it may go hence without day and recover from the plaintiff the said sum of one hundred and twenty-five thousand (\$125,000), with interest from September 20, 1906, and its costs and disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

STATE OF WASHINGTON, County of King.

R. W. BAXTER, being duly sworn, states:

That he is the President of the NORTHWESTERN COMMERCIAL COMPANY, a corporation, defendant in the above entitled action; that he has read the foregoing third amended answer,

knows the contents thereof, and that the statements therein are true.

R. W. BAXTER.

SUBSCRIBED and sworn to before me this 23rd day of September, A. D., 1914.

F. T. MERRITT,
Notary Public in and for the State of
Washington, residing at Seattle.

Service of within Amended Answer this 21st day of Sept., 1914,
and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Third Amended Answer. Filed in the U. S. District
Court, Western Dist. of Washington, Northern Division, Sept.
24, 1914, Frank L. Crosby, Clerk.

By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

v.

Northwestern Commercial Company, a corporation, Defendant.

Plaintiff's Demurrer to Third Amended Answer.

Comes now the plaintiff, and reserving its reply to the fourth
affirmative defense of the third amended answer herein, demurs
to said third amended answer as follows:

I.

Plaintiff demurs to the first affirmative defense contained in
said third amended answer on the grounds:

1st. That the new matter therein contained does not constitute a defense:

2nd. That the new matter therein contained is matter of purely equitable cognizance not properly pleadable in an action at law.

II.

Plaintiff demurs to the second affirmative defense contained in said third amended answer on the grounds:

1st. That the new matter therein contained does not constitute a defense;

2nd. That the new matter therein contained is matter of purely equitable cognizance not properly pleadable in an action at law.

III.

Plaintiff demurs to so much of the third affirmative defense contained in said third amended answer as was not stricken by the order of court entered herein on October 19th, 1914, on the ground:

That the new matter therein contained does not constitute a defense.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Plaintiff's Demurrer to Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 31, 1914. Frank L. Crosby, Clerk.

By E. M. L., Deputy.

United States District Court, Western District of Washington
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

v.

Northwestern Commercial Co., a corporation, Defendant.

Filed January 21, 1916.

On Demurrer to Third Amended Answer.

Demurrer overruled.

WILLIAM H. GORHAM,
For Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,
For Defendant.

NETERER, District Judge.

An order may be presented overruling the demurrer to each affirmative defense, and in this connection I desire to refer to the language employed in the order denying a motion to strike parts of the affirmative defense, filed October 16, 1914, in which it was said that the "matter being merely explanatory of the denial set forth in this defense and not being prejudicial." I refer to this language for the reason that it is apparent from the argument before the bar and the language employed that some of the matters set forth

in this answer in the several causes of defense, may prove to be purely matters of equitable defense, and if so, would have to be excluded upon the trial of the law action.

JEREMIAH NETERER,

Judge.

Indorsed: Opinion on the Demurrer to the Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 21, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company a corporation, Defendant.

Order overruling Demurrer to Third Amended Answer.

This cause having come on duly and regularly to be heard before the Court upon plaintiff's demurrer to the first, second and third affirmative defenses set forth in defendant's third amended answer herein,

The Court having duly considered said demurrer and the arguments of counsel thereon and the briefs of the respective parties thereon.

And the Court being fully advised in the premises and having heretofore on January 21, 1915, filed its memorandum decision overruling said demurrer,

Now Therefore, it is ordered, that said demurrer to the first and second affirmative defenses of the third amended answer be and the same is hereby in all things overruled; to which ruling plaintiff excepts and its exception is allowed;

And it is further ordered, that the demurrer to so much of the third affirmative defense in said third amended answer as was not stricken by order of the Court entered herein on October 19th, 1914, be and the same is hereby sustained. Exception noted.

Dated, Seattle, January 25th, 1915.

JEREMIAH NETERER,

Judge.

Order on Demurrer to Third Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Amended Complaint.

Plaintiff complains and alleges:

I.

That during all of the times herein mentioned the plaintiff was and now is a corporation duly organized and existing under the laws of the State of Maine and authorized to do and doing business in the State of Maine and elsewhere, from the date of its incorporation, March 17, 1906, until January 10, 1912, under the corporation name of Northwestern Development Company, and thereafter under the corporate name of Maine Northwestern Development Company, its corporate name being changed on said last named date in the manner prescribed by the laws of the State of Maine.

II.

That at all times since January 19, 1912, plaintiff has been and now is authorized under the laws of the State of Washington to do business within the State of Washington, and that it has paid its annual license last due, for the year ending June 30, 1912, to the State of Washington.

III.

That plaintiff was duly incorporated as aforesaid expressly to carry on, among others, the following lawful business:

"To purchase or otherwise acquire from John Rosene one hundred and seventy one certain mining claims and certain water rights in Alaska, and as payment therefor to issue and deliver \$3,750,000 par value of full paid and non-assessable shares in the common stock of the corporation and to pay the sum of \$245,000 in cash, on the terms of an agreement to be authorized by its board of directors;" with a capital stock of \$6,250,000, divided into two classes to-wit, one class \$2,500,000 preferred stock divided into 500,000 shares of the par value of \$5 each; the other class \$3,750,000 common stock divided into 750,000 shares of the par value of \$5 each.

IV.

That on, to-wit, March 20, 1906, plaintiff purchased from said Rosene said 171 mining claims and water rights in Alaska for the

sum of \$3,995,000, and as payment therefor on March 30, 1906, issued and delivered to the order of said Rosene \$3,750,000 par value of full paid and non-assessable shares in its common stock and thereafter paid the sum of \$245,000 in cash, on the terms of an agreement authorized by its board of directors, which said mining claims and water rights were, in the judgment of plaintiff's directors, necessary for its business, and which said sum of \$3,995,000 was, in the honest and bona fide judgment of plaintiff's directors, the fair and reasonable value of said mining claims and water rights.

V.

That said purchase by plaintiff from said Rosene of said mining claims and water rights as aforesaid was authorized by a resolution duly adopted by the unanimous vote of its board of directors at a meeting of said board duly called and held on March 20, 1906, at which all of the directors of plaintiff were present and participating; and that said directors, together with said Rosene, were on said last named day the owners and holders of all of the capital stock of plaintiff then issued and outstanding; and that said purchase was thereafter ratified, approved and confirmed by the unanimous vote of all of the stockholders of plaintiff at a meeting of said stockholders duly called and held on March 29, 1906 at Portland, Maine, at which meeting last aforesaid all of the capital stock of plaintiff then issued and outstanding was represented and voted.

VI.

That on March 21, 1906, said purchase was completed by the delivery by said Rosene to plaintiff of an indenture duly executed and acknowledged, between said Rosene and plaintiff, conveying to plaintiff said mining claims and water rights.

VII.

That thereafter and prior to April 4, 1906, of said full paid common stock so issued as aforesaid, 499,989 shares were by said Rosene deposited with A. A. Housman & Company for delivery to the order of the several subscribers to the preferred shares of capital stock of plaintiff, at the rate of one share of common for every \$5 paid on account of their subscriptions respectively, and ever since said last named date up to May 1, 1909, said A. A. Housman & Company have been ready, able and willing, and ever since said May 1, 1909, the plaintiff, as assignee of said A. A. Housman & Company of said common shares last aforesaid solely for the purpose of delivery as aforesaid, has been ready, able and willing to deliver common shares of plaintiff's capital stock

to the order of the several subscribers to the preferred shares of plaintiff's capital stock at the rate aforesaid.

VIII.

That plaintiff, at all times since said 4th day of April, 1906, has been and now is ready, able and willing to issue and deliver to defendant its preferred stock to the amount of defendant's subscription thereto, upon payment of said subscription.

IX.

That during all of the times herein mentioned, defendant was and now is a corporation organized and existing under the laws of the State of Washington.

X.

That subsequent to the incorporation of plaintiff from time to time subscriptions were made to said preferred stock under a form of subscription agreement common to all subscribing thereto; and of said \$2,500,000 preferred stock, the defendant, on, to-wit, April 4th 1906, by its subscription agreement in form common to all subscribers, for value received, subscribed to \$250,000 thereof and thereby agreed to pay therefor as follows:

20% of said subscription on signing;

10% of said subscription on July 15, 1906;

and the residue thereof from time to time as called for by the directors of plaintiff on thirty days' notice, provided that not over 50% of said subscription should be payable during the year 1906; a copy of which said subscription agreement so delivered by defendant is hereto annexed, marked Exhibit "A," hereby referred to and by such reference made a part hereof.

XI.

That between, to-wit, the 4th day of April 1906 and the 17th day of October 1906, both inclusive, defendant paid plaintiff on account of its said subscription to said preferred stock the sum of one hundred and twenty-five thousand (\$125,000) dollars, which amount was credited defendant on its said subscription as it was received from time to time.

XII.

That between the 4th day of April 1906 and the 9th day of November 1906, upon payment by defendant to plaintiff of said \$125,000, as aforesaid, plaintiff issued to defendant and defendant accepted therefor 25,000 shares of said preferred stock.

XIII.

That between the 4th day of April 1906 and the 9th day of November 1906, common shares of plaintiff's capital stock

deposited with A. A. Housman & Company as aforesaid, were delivered to the order of defendant as a subscriber to said preferred shares, at the rate of one share of common stock for every \$5 paid by defendant on account of its said subscription to preferred stock; and said preferred and common stock were so issued and delivered to the order of and accepted by defendant, from time to time, for payments made, as they were made, by defendant to plaintiff on its said subscription.

XIV.

That on, to-wit, the 15th day of January 1912, plaintiff, by resolution duly adopted at an adjourned meeting of a special meeting of its stockholders duly called and held on the 10th day of January 1912, and by resolution of its board of directors at a special meeting of said board duly called and held on the 22nd day of January 1912, duly levied and called for assessments on the residue of the subscriptions to its preferred capital stock in said subscription agreement referred to, payable on or before the 12th day of March 1912, to the Treasurer of plaintiff in care of, either A. A. Housman & Company, at 20 Broad Street, New York City, or Union Savings & Trust Company, Seattle, Washington, as follows:

Assessment No. 1, of 20% on the preferred shares of said capital stock and on the subscriptions thereto;

Assessment No. 2, of 50% on the preferred shares of said capital stock and on the subscriptions thereto; and thereby directed that thirty days' written notice thereof be given subscribers to said preferred shares, and further directed and provided that so much of each subscription to said preferred shares in excess of 30% thereof agreed to be paid as therein provided and not exceeding 50% thereof, as had theretofore been paid to plaintiff by subscribers thereto, be credited upon said assessment No. 1, against said preferred shares so subscribed and upon which said excess had been so paid; and that so much of each subscription to said preferred shares in excess of 50% thereof, agreed to be paid as in said subscription agreement provided, as had theretofore been paid to plaintiff by subscribers thereto, be credited upon said assessment No. 2 against the preferred shares so subscribed and upon which such amount in excess of 50% had been so paid.

XV.

Thereafter, at a special meeting of the stockholders of plaintiff duly called and held on the 1st day of March 1912, at the office of plaintiff in the City of Portland, State of Maine, the acts of its stockholders at the special meeting of its stockholders on January 15, 1912 aforesaid, and the acts of its board of directors,

in adopting the resolution of January 22, 1912, as aforesaid, in levying and calling for said assessments, directing thirty days' notice thereof to be given, fixing the time when, and place where, and the person to whom the same should be payable, and directing so much of said subscriptions to said preferred stock in excess of 30% as had theretofore been paid be credited upon said assessments aforesaid, were duly ratified and confirmed.

XVI.

That on, to-wit, the 8th day of February 1912, plaintiff gave defendant thirty days' written notice of said calls and assessments, of the time when, place where, and person to whom payments thereof were payable, and of the credit on assessment No. 1, on defendant's subscription of a sum equal to the sum of said assessment No. 1 of defendant's subscription theretofore paid by defendant on said subscription, all as provided in said resolution last aforesaid.

XVII.

That defendant failed and refused and does still fail and refuse to pay assessment No. 2 on its said subscription to said preferred stock; and there is now due and owing from defendant to plaintiff thereon the sum of \$125,000 together with interest thereon from March 12, 1912.

XVIII.

That on March 13th 1913, plaintiff by resolution of its board of directors duly authorized and empowered its President to bring suit or suits against subscribers to its preferred capital stock to collect delinquent assessments thereon.

Wherefore, plaintiff prays judgment against defendant in the sum of one hundred and twenty five thousand (\$125,000) dollars, together with interest thereon from March 12, 1912 until paid, and for its costs and disbursements herein.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Exhibit "A"

Northwestern Development Company
(Incorporated under the laws of Maine).

Preferred stock	\$2,500,000
Common stock	3,750,000

The preferred stock is to be entitled to dividends aggregating 100 per cent. before any payment of dividends on common stock. Thereafter dividends will be paid at the same rate on both classes of stock. On liquidation, the preferred stock shall be entitled to payment at par, and thereafter the remainder of assets shall be

divided among the holders, of the common stock. Also, first mortgage 6 per cent. 15-year bonds of the Seward Peninsula Railway (to an amount not exceeding \$1,000,000 out of an authorized issue not exceeding \$3,000,000) shall be receivable at par for dividends on the preferred stock, after the railway company shall have earned during two consecutive years 15 per cent. for each year on the actual cost of construction, after paying operating and other expenses (except interest) and taxes.

For value received, the undersigned subscribers, severally and each for himself and not for any other, agrees with the Northwestern Development Company and with each other, to take and pay for the number of preferred shares set opposite their names respectively at par, and agree to pay therefor as follows:

20 per cent. of each subscription on signing;

10 per cent. of each subscription on July 15, 1906; and the residue from time to time as called by the Directors of the said corporation or thirty days' notice, provided that not over 50 per cent. of each subscription shall be payable during the year 1906.

Payments shall be made to A. A. Housman, Treasurer, at 20 Broad Street, New York, and full paid shares up to the amounts paid in shall be delivered therefor.

In case any subscriber shall fail to pay any installment according to the terms hereof, the corporation may cancel his subscription with such penalties, not exceeding forfeiture of the amount therefore paid on such subscription, as it may determine and re-allot the same.

It is understood that common shares of the corporation have been deposited with A. A. Housman & Company, and will be delivered to the order of the several subscribers at the rate of one share for every \$5 paid on account of their subscription respectively.

Name of subscriber	Address	Preferred Stock subscribed for
Northwestern Commercial Co., per John Rosene, Pres.	Seattle	\$250,000

United States of America, Western District of Washington

ss

T. A. Davies, being first duly sworn, on oath says: That he is the president of the plaintiff in the above entitled action; that

he has heard the foregoing amended complaint read, knows the contents thereof, and believes the same to be true.

T. A. Davies.

Subscribed and sworn to before me this 30th day of July,
A. D. 1915.

A. E. Ritzwaller.

Notary Public in and for the State
of Washington, residing at Seattle,
Washington.

(SEAL)

Copy of within Amended Complaint received this 30th day of
July, 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Amended Complaint. Filed in the U. S. District
Court, Western Dist. of Washington, Northern Division, July 31,
1915. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the United States District Court for the Western District of
Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.

Amended answer to amended complaint.

The defendant comes and for answer to the last amended
complaint of plaintiff herein, states, alleges and denies as follows:

I.

Defendant denies that it has any knowledge or information
sufficient to form a belief as to any of the allegations set forth in
paragraphs numbered I, II, V, VI, VII, VIII, XIV, XV, and XVIII
of said amended complaint.

II.

Defendant denies each and every allegation contained in

paragraphs numbered IV, X, XI, XII and XIII of said amended complaint.

III.

Defendant admits that plaintiff was organized with a capital stock of Six Million Two Hundred Fifty Thousand Dollars (\$6,250,000.), divided into two classes, to-wit: One class, Two Million Five Hundred Thousand Dollars (\$2,500,000.), preferred stock, divided into five hundred thousand shares, of the par value of Five Dollars (\$5.00) each; the other class, Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.), common stock, divided into seven hundred fifty thousand (750,000) shares, of the par value of Five Dollars (\$5.00) each. It denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations contained in paragraph numbered III of said amended complaint.

IV.

Defendant admits the allegations contained in paragraph numbered IX of said amended complaint.

V.

Defendant admits that on or about the 8th day of February, 1912, this defendant received a written notice from plaintiff of certain alleged calls and assessments alleged to have been made by said plaintiff, requiring payment by this defendant of the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.) alleged to be payable under said alleged subscription, but denies each and every other allegation contained in paragraph numbered XVI of said amended complaint.

VI.

Defendant admits that it failed and refused, and does still fail and refuse to pay the assessment referred to in paragraph XVII of said amended complaint, or any other assessment made by plaintiff against it, but denies each and every other allegation contained in said paragraph numbered XVII.

AND FOR A FURTHER AND FIRST AFFIRMATIVE DEFENSE, defendant says:

I.

That the John Rosene mentioned in said amended complaint at the time said subscription is alleged in said complaint to have been made by him on behalf of this defendant, and prior thereto, was one of the promoters and managing directors of said plaintiff, and had entered into certain contracts with certain other promoters thereof and with said plaintiff whereby it was agreed, among other things, that said Rosene, together with said other promoters, would organize the plaintiff corporation; that said John

Rosene and certain other persons were the owners of certain mining claims and water rights in Alaska, of little value, and which they were desirous of selling, and it was agreed, among other things, between said Rosene and said other owners of said mining property, and said other promoters of plaintiff corporation, that when said corporation was organized, the title to said mining property would be conveyed to said Rosene by the other owners thereof, and that said Rosene would thereupon convey said property to said plaintiff corporation, and would receive therefor, in full payment for said property, the sum of two hundred and forty-five thousand dollars (\$245,000.); that one million two hundred fifty thousand dollars (\$1,250,000.) par value of the capital stock of plaintiff corporation, of the class known as common stock, should be issued, ostensibly as part payment for said property, but in reality as a bonus and gift to said Rosene and said other promoters of plaintiff corporation; that it was further understood and agreed, among other things, and as a part of said arrangement, that said Rosene would provide the money to be paid for said mining property by subscribing for preferred shares of stock of plaintiff on behalf of this defendant to the amount of two hundred fifty thousand dollars (\$250,000.), and that the money realized on such subscription should and would be appropriated to the payment to said Rosene of said two hundred and forty-five thousand dollars (\$245,000) under said contract. That the said alleged subscription on behalf of this defendant, referred to in said complaint, was made by said Rosene and accepted by said plaintiff pursuant to this agreement and understanding by him with said plaintiff and its promoters, and in furtherance thereof and of his own personal interests and those of said other promoters, and not otherwise. That said plaintiff corporation, after its organization and its officers and directors, had full knowledge of the facts, understandings and agreements hereinabove set out, and became a party thereto; that the said subscription so attempted to be made by said Rosene on behalf of this defendant was accepted by plaintiff with knowledge of all the facts herein set out, and pursuant to said agreements the said common stock herein mentioned was issued by plaintiff to said promoters; that this defendant did not authorize nor approve said subscription so attempted to be made on its behalf and was ignorant of the secret understandings, agreements and interests of said Rosene herein set out until during the years 1910 or 1911. That at a meeting of the Trustees, in April, 1906, at which said Rosene was present when said defendant was first notified that said Rosene had made said alleged subscription, said Trustees immediately disapproved thereof, of which disapproval verbal notice was soon thereafter given to the president and treasurer of plaintiff by said Rosene and by other of defendant's

trustees, but defendant is not able at this time to give the names of such other trustees so giving this notice; and in September, 1906, when defendant learned that \$125,000 of its moneys and assets had without its authority been applied by said Rosene or under his direction as payment on said subscription, its said trustees again disapproved said subscription, and at that time, to-wit, September 5th, 1906, said Trustees authorized a subscription to be made on its behalf to the preferred stock of plaintiff in the sum of \$125,000, and no more, it being intended and understood by said Trustees that the moneys and assets of defendant previously given to plaintiff by said Rosene or under his direction, as hereinabove stated, in the sum of \$125,000, were to be applied in payment of the subscription so authorized by the trustees of defendant,—of all of which verbal notice was given by defendant through said Rosene and its other trustees, soon thereafter, to the president and treasurer of plaintiff, and the said moneys were so applied by them. That in April, 1907, the Board of Trustees of defendant, by resolution then passed, again repudiated and disapproved the alleged subscription made by said Rosene, and written notice thereof was given immediately thereafter by J. D. Thenholme, secretary of defendant, to plaintiff, by letter addressed to plaintiff at its then post-office address.

That no claim against this defendant under said alleged subscription by said Rosene was made or asserted by plaintiff, subsequent to September, 1906, until in August, 1910, when defendant received notice of certain assessments or calls alleged to have been made by plaintiff at that time against defendant, based upon said alleged subscription by Rosene, and a demand for payment thereof; that defendant, by and through its attorneys, Bogle & Spooner, by letter to plaintiff on August 19, 1910, again notified plaintiff that said alleged subscription was unauthorized and had been and was repudiated by defendant and denied any indebtedness whatever to plaintiff thereon.

II.

That upon the organization of plaintiff company, said Rosene, pursuant to said agreement and understanding, did convey said mining claims to said plaintiff.

III.

That said Rosene subsequently, without the knowledge or consent of this defendant, caused moneys of this defendant, aggregating One Hundred Twenty-five Thousand Dollars (\$125,000) to be turned over to plaintiff on said alleged subscription, and said plaintiff turned said money, or a large part thereof, over to said Rosene pursuant to the terms of the agreement and understanding hereinbefore set out.

AND FOR A SECOND AND FURTHER AFFIRMATIVE DEFENSE, defendant says:

I.

It repeats all of the allegations contained in its first affirmative defense herein.

II.

That on or about the 5th day of September, 1906, this defendant learned that said John Rosene, without its knowledge or consent, had turned over funds of this defendant to plaintiff in the aggregate amount of One Hundred and Twenty-five Thousand Dollars (\$125,000) on said alleged subscription, which subscription had theretofore been disaffirmed by this defendant as stated in the first affirmative defense, to which reference is here made; that defendant, having a claim or right under the law and the facts, to recover from plaintiff said sum so received by it, the said plaintiff, acting by and through the said John Rosene, its managing director, and Henry C. Davis, its president, and Arthur A. Hausman, its treasurer and a director, they being duly authorized to act for plaintiff in the premises, and said Rosene being authorized to act therein for defendant to secure a release of any further claim of liability against defendant on said pretended subscription, agreed and stipulated, orally, to waive and release, and did waive, release and discharge this defendant from any liability to plaintiff and from any further claim of any kind or nature, by plaintiff against defendant for or on account of said alleged subscription agreement, in consideration of the oral waiver and release by defendant acting through said Rosene, of its right or claim of right to recover from plaintiff the said sum of One Hundred and Twenty-five Thousand Dollars (\$125,000) so turned over to it from or out of the assets of this defendant, as above stated.

III.

That said agreement of settlement, mutual release and accord was accepted by plaintiff by its officers above named and acquiesced in for a period of more than three (3) years, and no claim was made or asserted by it against this defendant of any kind whatever until in August, 1910.

AND FOR A FURTHER AND FOURTH AFFIRMATIVE DEFENSE, defendant says:

The right of action of plaintiff herein did not accrue within six (6) years prior to the commencement of this action.

AND FOR A FIFTH AFFIRMATIVE DEFENSE, defendant says:

I.

That said plaintiff was promoted and organized by one John

Rosene, A. A. Hauseman and L. H. French, and their associates, under the Corporation Laws of Maine, being the Revised Statutes of Maine of 1904; that Section 50 of Chapter 47 of said laws provides:

“Any corporation may purchase mines, manufactories, and other property necessary for its business, and the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for the business, and issue stock to the amount of the value thereof in payment therefor, and may likewise issue stock for services rendered to such corporation and the stock so issued shall be full paid stock and not liable to any further call or payment thereon, and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased, or services rendered, shall be conclusive.”

That Section 87 thereof also provides:

“The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription to or agreement for the capital stock of any corporation, shall be deemed a payment within the purview of this chapter, unless bona fide made in cash, or in some other matter or thing at a bona fide and fair valuation thereof.”

II.

That the said promoters, in order to secure for themselves and others the common stock of said corporation, as a bonus and gift, and without the payment of any money to said corporation therefor, or the receipt by said corporation of any property, services or other thing of value as a consideration for the issuance of said common stock, and contrary to the laws and public policy of said state, entered into a scheme or device to that end as follows:

The said Rosene and French, and other associates of theirs, held or owned the certain mining claims and water rights in said amended complaint mentioned, which they agreed, with said other promoters, to sell to said corporation, when organized, for the sum or price of Two Hundred Forty-five Thousand Dollars (\$245,000). It was arranged and agreed by said owners and by said promoters and by the officers and directors of plaintiff (when organized), that said mining property and water rights should be conveyed to said corporation, and that the ostensible consideration to be stated in the documents and resolutions would be Two Hundred Forty-five Dollars (\$245), in cash, and Three Million Seven Hundred Fifty Thousand dollars (\$3,750,000), par value of the common stock, being all of the authorized common stock of plaintiff, although the real consideration would be Two Hundred Forty-five Thousand Dollars

(\$245,000) in money; that the cash consideration, to-wit, Two Hundred Forty-five Thousand Dollars (\$245,000) should be paid by plaintiff to the said Rosene for the owners or holders of said mining property and water rights; that the Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000), par value, of said common stock should be issued to A. A. Hauseman & Co. by plaintiff, and that they should deliver One Million Two Hundred Fifty Thousand Dollars (\$1,250,000) to said John Rosene, L. H. French and A. A. Hauseman, as a bonus or gift to them as promoters of said plaintiff; and that the remainder of said common stock, to-wit, two million five hundred thousand dollars (\$2,500,000) par value, should be delivered by said A. A. Hauseman & Co. to subscribers to the preferred stock, from time to time as such subscriptions were obtained and paid.

That said scheme or device was well known to the officers and directors of plaintiff, and was by their aid and co-operation carried out, and the common stock referred to in said amended complaint which plaintiff avers it is ready and offers to deliver to this defendant, is a part of the Two Million Five Hundred Thousand Dollars (\$2,500,000) common stock so illegally issued and delivered to A. A. Hauseman & Co. pursuant to the scheme and devise hereinabove set out.

III.

That said common stock was issued by plaintiff to said A. A. Hauseman & Co. and was never issued or delivered to the vendors of said property.

IV.

The said mining property and water rights were of little, if any, real value, and were not considered by the vendors nor by plaintiff nor its officers and directors as having either an actual or speculative value in excess of the Two Hundred Forty-five Thousand Dollars (\$245,000) cash paid therefor; and was not at any time valued by said plaintiff or by its directors in good faith, in the exercise of their honest judgment, at any sum in excess of Two Hundred Forty-five Thousand Dollars (\$245,000).

V.

That the directors of plaintiff, at the time of the issuance or the authorizing of the issuance of said stock and the purchase of said property, had been selected and were controlled by said Rosene, French and Hauseman, and acted in their interest and under their control, and had no knowledge whatever of said property or its value, and if they pretended to make any valuation of said property, they acted wholly under the direction and control and in the interest of said promoters in so doing, and exercised no inde-

pendent judgment and did not in fact make any bona fide valuation of said property.

VI.

That the plaintiff corporation has never had under its ownership or control, so as to be able to issue or cause to be issued to the defendant, in performance of the subscription contract, any shares of its common stock for which the par value has at any time been paid in money or in labor done, or property received, either of an actual value equal to not less than par, or at a valuation not less than par made in good faith by the directors of the plaintiff, but that all the common stock proposed and offered in said amended complaint to be issued or delivered to this defendant under said subscription has been or will be illegally issued under and pursuant to the fraudulent scheme and device hereinabove set out, and for no consideration whatever to said plaintiff or else for alleged labor or property at a valuation by the plaintiff's directors not fixed in good faith and known by plaintiff and its directors to be excessive and beyond any fair valuation of such labor or property.

WHEREFORE, defendant prays that said complaint may be dismissed, and that it may go hence without day and recover from the plaintiff its costs and disbursements herein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

State of Washington, County of King, ss.

R. W. Baxter, being duly sworn, states: That he is the president of the Northwestern Commercial Company, a corporation, defendant in the above entitled action; that he has read the foregoing amended answer, knows the contents thereof, and that the statements therein are true.

R. W. BAXTER.

Subscribed and sworn to before me this 18th day of September, A. D. 1915.

CARROLL A. GORDON,
Notary Public in and for the State of Washington,
residing at Seattle.

Service of within Answer this 18th day of Sept., 1915, and receipt of copy thereof, admitted.

W. H. GORHAM,
Attorney for Plaintiff.

Indorsed: Amended Answer to Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sept. 20, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, Plaintiff,

v.

Northwestern Commercial Company, Defendant.

Motion to strike third affirmative defense of answer.

Comes now the above named plaintiff and moves the Court to strike the third affirmative defense of the defendant's amended answer to the amended complaint herein on the grounds:

- (1) That the same is irrelevant;
- (2) That the same is inconsistent with the plea of **non est factum** contained in the general denials of said answer.
- (3) That the same is inconsistent with the allegations of repudiation contained in the first and second affirmative defenses of said answer.

WILLIAM H. GORHAM,
Attorney for plaintiff.

Copy of within Motion received this 1st day of October., 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Motion to strike third affirmative defense to amended answer to amended complaint. Filed in the U. S. District Court, Western Distr. of Washington, Northern Division, Oct. 2, 1915. Frank L. Crosby, Clerk. By E.M. L. Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Order granting motion to strike affirmative defense to amended answer to amended complaint.

This cause coming on regularly for hearing on the Motion of

plaintiff to strike the third affirmative defense to the amended answer to amended complaint,

The Court having heard argument of counsel for the respective parties and being fully advised in the premises,

It is ordered that said Motion be granted;

To which order defendant excepts and its exception is allowed.

Done in open court this 7th day of October, 1915.

JEREMIAH NETERER,
Judge.

O. K.—Graves.

Indorsed: Order granting motion to strike 3rd affirmative defense to amended answer to amended complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 7, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

REPLY.

Comes now the plaintiff and, replying to defendant's amended answer to the amended complaint herein, alleges:

As to the **first** affirmative defense thereof:

I.

That it admits the allegations of said first affirmative defense that said John Rosene, at the time of said subscription and prior thereto, was one of the promoters and a director of said plaintiff; that said Rosene was present at a meeting of defendant's trustees in April 1906; that at said meeting defendant was notified that said Rosene had made said subscription; that defendant's trustees, on September 5th 1906, authorized a subscription to be made on its behalf to the preferred stock of plaintiff in sum of \$25,000; and it denies generally each and every other allegation contained in said first affirmative defense.

II.

That a code of by-laws, including by-laws No. 25, for its government was duly adopted by plaintiff on March 17, 1906, in

accordance with chapter 47 of the Revised Statutes of Maine 1904, and of acts amendatory thereof and additional thereto, a copy of which said by-law No. 25, marked Exhibit B is hereto annexed, hereby referred to and by such reference made a part hereof, which, at all times in plaintiff's amended complaint mentioned, was in full force and effect.

III.

That a form of stock certificate for the preferred capital stock of plaintiff was duly adopted by plaintiff's board of directors on March 21, 1906, a copy of which form marked Exhibit C is hereto annexed, hereby referred to and by such reference made a part hereof, which form, at all times in plaintiff's amended complaint mentioned, was in full force and effect.

IV.

That on, to-wit, April 21, 1906, defendant paid plaintiff on account of said subscription agreement the sum of \$50,000 receiving therefor from plaintiff certificate of stock No. 37, Series G, for 10,000 shares of preferred capital stock of plaintiff, in the form of stock certificate aforesaid, which said 10,000 shares of stock were carried as an item of investment of defendant on the general books of defendant at the close of its fiscal year, April 30, 1906, and was included in the item "capital assets" of defendant in its annual report for the fiscal year ending April 30, 1906, issued by defendant to its stockholders.

That defendant made further payments to plaintiff on account of said subscription agreement and received therefor from plaintiff certificates of shares of the preferred capital stock of plaintiff, in the form of stock certificate aforesaid, as follows, to-wit:

On July 15, 1906, the sum of \$25,000 receiving therefor certificates of stock, Nos. 1 to 5, inclusive, Series F, for 1,000 each, aggregating 5,000 shares of the preferred capital stock of plaintiff;

On September 6, 1906, the sum of \$25,000 receiving therefor certificates Nos. 6 to 10, inclusive, Series F, for 1,000 shares each, aggregating 5,000 shares of the preferred capital stock of plaintiff;

On September 25, 1906, the sum of \$25,000, receiving therefor certificates of stock Nos. 11 to 15, inclusive, Series F, for 1,000 shares each, aggregating 5,000 shares of the preferred capital stock of plaintiff;

All of which 15,000 shares of stock last aforesaid were, between July 15, 1906 and November 9, 1906, issued by plaintiff and accepted by defendant, and were, together with said 10,000 shares of stock, certificate No. 37, Series G, carried as an item of investment of defendant on the general books of defendant at the close of its fiscal year, April 30, 1907, and were included in the item; "Capital Assets, stock in other Companies;" in its statement showing its

financial condition at the close of its fiscal year ending April 30, 1907, issued by defendant to its stockholders.

VI.

That defendant had notice, by its acceptance of said certificates of stock as aforesaid, as to its rights as a shareholder of plaintiff and to what provisions and terms contained and specified in the charter and by-laws of plaintiff, defendant thereby assented to, as in said certificates of stock expressly provided; and defendant was thereby put on inquiry as to, and had notice of, plaintiff's acquiring by purchase from said Rosene said mining claims and water rights for \$245,000 cash and \$3,750,000 in common stock of plaintiff, as aforesaid.

VII.

That at the meeting of trustees in April 1906, as alleged in the 1st paragraph of said first affirmative defense, defendant was notified that said Rosene had made said subscription; which said meeting of defendant's trustees was held at Seattle, Washington, on April 12, 1906;

But no action was then taken by defendant or by its trustees on said subscription agreement and action on the same was, at the adjournment of said meeting, left open by defendant and its trustees for the future consideration and action by said trustees; and the subject of said subscription agreement was not again taken up by defendant or its trustees until the next meeting of said trustees, which was held at Seattle, Washington, on September 5, 1906, at which said subscription again came up for their consideration and action and was fully discussed and defendant's trustees then and there attempted to ratify said subscription agreement to the extent of the sum of \$125,000, by adopting a resolution authorizing its president to subscribe for stock of plaintiff for defendant in said sum of \$125,000; and thereupon, at the meeting last aforesaid, a further resolution was adopted by said trustees authorizing and directing defendant's president to sell and dispose of stock held by defendant in plaintiff company down to \$50,000; but no further or other action was taken by defendant's trustees at said time respecting said subscription agreement;

That defendant at no time held any stock of plaintiff company other than that acquired under said subscription agreement as in said amended complaint alleged.

VII.

That on, to-wit, January 23rd 1907, defendant was represented in a stockholders' meeting of plaintiff's stockholders and participated in the transactions of plaintiff's business therein, as a stockholder of plaintiff holding said 25,000 shares of preferred stock of

plaintiff, by voting as such stockholder affirmatively upon a resolution which was adopted at said meeting of January 23rd 1907, which resolution ratified all the acts, votes and proceeding of every description theretofore done, passed and taken by the incorporators, stockholders, officers and directors of plaintiff, including the issuance of its common stock as aforesaid.

IX.

That notwithstanding all of the matters and things in this reply hereinbefore alleged and set forth, neither defendant nor its trustees ever disaffirmed or repudiated said subscription agreement until April 10, 1907, when at a meeting of defendant's trustees held at Seattle, Washington, a resolution was adopted affirming defendant's subscription to the capital stock of plaintiff in the sum of \$125,000 and no more and directing its attorney to prepare the necessary notice to be sent by its secretary to plaintiff notifying plaintiff that no subscription for the capital stock of plaintiff was ever authorized in any sum whatever except for \$125,000;

That at a meeting of the executive committee of defendants trustees, held at Seattle, Washington, on September 18th 1907, a resolution was adopted that defendant's proxy be forwarded to one S. W. Eccles to represent defendant at a special meeting of plaintiff's stockholders to be held at plaintiff's office in the City of Portland, State of Maine, on October 3rd 1907, said proxy to be given with power of substitution and a further resolution was adopted at said meeting directing defendant's treasurer to have defendant's stock in plaintiff company re-issued in defendant's name.

X.

That on, to-wit, October 5, 1908, by letter from plaintiff's president, addressed and delivered to defendant at Seattle, Washington, enclosing and calling defendant's attention to a circular letter, of date April 9, 1908, from the secretary of a committee of preferred stockholders of plaintiff, accompanied by a report of date April 7, 1908, of plaintiff's legal advisers and a financial statement of accountants therein enclosed, the fact that plaintiff had acquired by purchase from said Rosene said mining claims and water rights, as contemplated by its charter and by-laws for \$245,000 cash and \$3,750,000 par value full paid non assessable shares of the common stock of plaintiff, was made known to defendant; and that thereafter and some time during the month of October 1908, the exact day being unknown to plaintiff, at Seattle, Washington, defendant's president personally acknowledged receipt of said letter and its enclosures to plaintiff's president, at which time last aforesaid, the original capitalization of plaintiff, the purchase by it from said Rosene of certain mining claims and water rights for \$245,000

financial condition at the close of its fiscal year ending April 30, 1907, issued by defendant to its stockholders.

VI.

That defendant had notice, by its acceptance of said certificates of stock as aforesaid, as to its rights as a shareholder of plaintiff and to what provisions and terms contained and specified in the charter and by-laws of plaintiff, defendant thereby assented to, as in said certificates of stock expressly provided; and defendant was thereby put on inquiry as to, and had notice of, plaintiff's acquiring by purchase from said Rosene said mining claims and water rights for \$245,000 cash and \$3,750,000 in common stock of plaintiff, as aforesaid.

VII.

That at the meeting of trustees in April 1906, as alleged in the 1st paragraph of said first affirmative defense, defendant was notified that said Rosene had made said subscription; which said meeting of defendant's trustees was held at Seattle, Washington, on April 12, 1906;

But no action was then taken by defendant or by its trustees on said subscription agreement and action on the same was, at the adjournment of said meeting, left open by defendant and its trustees for the future consideration and action by said trustees; and the subject of said subscription agreement was not again taken up by defendant or its trustees until the next meeting of said trustees, which was held at Seattle, Washington, on September 5, 1906, at which said subscription again came up for their consideration and action and was fully discussed and defendant's trustees then and there attempted to ratify said subscription agreement to the extent of the sum of \$125,000, by adopting a resolution authorizing its president to subscribe for stock of plaintiff for defendant in said sum of \$125,000; and thereupon, at the meeting last aforesaid, a further resolution was adopted by said trustees authorizing and directing defendant's president to sell and dispose of stock held by defendant in plaintiff company down to \$50,000; but no further or other action was taken by defendant's trustees at said time respecting said subscription agreement;

That defendant at no time held any stock of plaintiff company other than that acquired under said subscription agreement as in said amended complaint alleged.

VII.

That on, to-wit, January 23rd 1907, defendant was represented in a stockholders' meeting of plaintiff's stockholders and participated in the transactions of plaintiff's business therein, as a stockholder of plaintiff holding said 25,000 shares of preferred stock of

plaintiff, by voting as such stockholder affirmatively upon a resolution which was adopted at said meeting of January 23rd 1907, which resolution ratified all the acts, votes and proceeding of every description theretofore done, passed and taken by the incorporators, stockholders, officers and directors of plaintiff, including the issuance of its common stock as aforesaid.

IX.

That notwithstanding all of the matters and things in this reply hereinbefore alleged and set forth, neither defendant nor its trustees ever disaffirmed or repudiated said subscription agreement until April 10, 1907, when at a meeting of defendant's trustees held at Seattle, Washington, a resolution was adopted affirming defendant's subscription to the capital stock of plaintiff in the sum of \$125,000 and no more and directing its attorney to prepare the necessary notice to be sent by its secretary to plaintiff notifying plaintiff that no subscription for the capital stock of plaintiff was ever authorized in any sum whatever except for \$125,000;

That at a meeting of the executive committee of defendants trustees, held at Seattle, Washington, on September 18th 1907, a resolution was adopted that defendant's proxy be forwarded to one S. W. Eccles to represent defendant at a special meeting of plaintiff's stockholders to be held at plaintiff's office in the City of Portland, State of Maine, on October 3rd 1907, said proxy to be given with power of substitution and a further resolution was adopted at said meeting directing defendant's treasurer to have defendant's stock in plaintiff company re-issued in defendant's name.

X.

That on, to-wit, October 5, 1908, by letter from plaintiff's president, addressed and delivered to defendant at Seattle, Washington, enclosing and calling defendant's attention to a circular letter, of date April 9, 1908, from the secretary of a committee of preferred stockholders of plaintiff, accompanied by a report of date April 7, 1908, of plaintiff's legal advisers and a financial statement of accountants therein enclosed, the fact that plaintiff had acquired by purchase from said Rosene said mining claims and water rights, as contemplated by its charter and by-laws for \$245,000 cash and \$3,750,000 par value full paid non assessable shares of the common stock of plaintiff, was made known to defendant; and that thereafter and some time during the month of October 1908, the exact day being unknown to plaintiff, at Seattle, Washington, defendant's president personally acknowledged receipt of said letter and its enclosures to plaintiff's president, at which time last aforesaid, the original capitalization of plaintiff, the purchase by it from said Rosene of certain mining claims and water rights for \$245,000

and \$3,750,000 in common stock of plaintiff full paid and non-assessable, was discussed between said presidents.

That more than three years next succeeding elapsed since the delivery to and acceptance by defendant of said 25,000 shares of preferred stock of plaintiff as aforesaid, the voting of said stock by defendant at said stockholders' meeting on January 23rd 1907, the receipt by defendant of said letter of October 8, 1908, with enclosures and the discussion between said presidents of the purchase of said mining property by plaintiff as aforesaid, during which time defendant has not disaffirmed or repudiated said subscription agreement on account of said purchase or the payment and delivery to said Rosene of the consideration therefor or at all.

XI.

That by reason of the premises defendant is stopped from disaffirming or repudiating or claiming a disaffirmance or repudiation of said subscription agreement.

As to the **second** affirmative defense thereof:

I.

That as to the first paragraph of said second affirmative defense, it here repeats each and every allegation contained in its reply to the first affirmative defense of defendant's amended answer to the amended complaint herein.

II.

That as to paragraphs two and three of said second affirmative defense, it denies generally each and every allegation therein contained.

As to the **fourth** affirmative defense thereof:

I.

That it denies generally each and every allegation therein contained.

As to the **fifth** affirmative defense thereof:

I.

It denies generally each and every allegation contained therein.

II.

That a code of by-laws, including by-law No. 25, for its government was duly adopted by plaintiff on March 17th 1906, in accordance with chapter 47 of the Revised Statutes of Maine, 1904, and of acts amendatory thereof and additional thereto, a copy of which said by-law No. 25, marked Exhibit B is hereto annexed, hereby referred to and by such reference made a part hereof, which, at all

times in plaintiff's complaint mentioned, was in full force and effect.

III.

That a form of stock certificate for the common capital stock of plaintiff was duly adopted by plaintiff's board of directors on March 21st 1906, a copy of which form marked Exhibit C1 is hereto annexed, hereby referred to and by such reference made a part hereof, which form was at all times in plaintiff's amended complaint in full force and effect.

IV.

That defendant, by its acceptance of common stock of plaintiff company as alleged in paragraph XIII of the amended complaint herein, had notice as to its rights as a shareholder of plaintiff and as to what provisions and terms contained and specified in plaintiff's charter and by-laws defendant thereby assented to; and defendant was thereby put on inquiry as to and had notice of plaintiff's articles of incorporation, its by-laws, its capitalization, its purchase of said mining claims and water rights from said Rosene for \$3,995,000; cash \$245,000 and full paid common stock of plaintiff \$3,750,000, and of the deposit of 499,989 shares of said common stock for delivery to the several subscribers of plaintiff's preferred stock at the rate of one share of common for every \$5 paid on account of subscriptions to preferred stock, all as alleged in paragraphs III, IV, V, VI and VII of said amended complaint.

V.

That on, to-wit, January 23rd 1907, defendant was represented at a stockholders' meeting of plaintiff's stockholders held in the City of Portland, State of Maine, and participated in the transactions of plaintiff's business therein, as a shareholder of plaintiff holding the common stock of plaintiff delivered to and accepted by it as alleged in paragraph XIII of plaintiff's amended complaint herein, by voting as such stockholder affirmatively upon a resolution which was adopted at said meeting of January 23rd 1907, which resolution ratified all the acts, votes and proceedings of every description theretofore done, passed and taken by the incorporators, stockholders, officers and directors of plaintiff, including the issuance of its common stock as aforesaid.

VI.

That more than three years next succeeding have elapsed since said common stock was delivered to and accepted by defendant as aforesaid and since said January 23rd 1907, during which period defendant has not disaffirmed or repudiated said subscription a-

greement on account of the issue by plaintiff of its common stock as afore said or at all.

VII.

That by reason of the premises defendant is estopped from disaffirming or repudiating or claiming a disaffirmance or repudiation of said subscription agreement on account of the issue by plaintiff of its common stock as aforesaid.

Wherefore, plaintiff prays for judgment as in its amended complaint herein.

WILLIAM H. GORHAM.
Attorney for Plaintiff.

Exhibit B.

“Issue of capital stock in payment for certain properties.

25. Without in way by reference, inference or otherwise restricting or limiting the business or purposes of the corporation as specified in its certificate of organization or the powers of the board of directors as set out in these by-laws, the corporation may purchase or otherwise acquire from John Rosene 171 certain placer mining claims and certain water rights in Alaska and may issue and deliver in payment therefor \$3,750,000 par value of full paid and non-assessable shares in the common stock of the corporation, and may pay the sum of \$245,000 in cash on the terms of an agreement between the said Rosene and the Company to be hereafter authorized by the board of directors. All certificates issued for shares in the capital stock of the corporation shall contain an express reference to these by laws and the holder of any such shares by accepting any such certificates either before or after the purchase of the said mining claims and water rights and the transfer thereof to the corporation, thereby consents to the same and agrees that all the said shares so issued in payment for such mining claims and water rights shall be or were when issued fully paid by the sale and transfer thereof and not liable to any further calls or assessments whatsoever. And notice is hereby expressly and for all time given that all shares in the capital stock of this corporation are issued and accepted upon the express understanding that there shall be no liability on the part of the incorporators, organizers and promoters of this corporation or any of them on the ground that they stand in any fiduciary relation thereto or on the ground that they have fixed the price payable by this corporation for the said mining claims and water rights or in the circumstances that this corporation has no independant board of directors, and that there shall be no liability on the part of the incorporators, organizers and promoters of this corporation or any of them arising from or in any way growing out of the sale and transfer to it of the said mining claims and water rights. And no contract or arrangement made or entered

into on behalf of this corporation with any other corporation or with any officer or director of this corporation, or any firm, association or corporation of which such officer or director is a member, director, officer or stockholder shall be rendered void or voidable by reason of the fact that the board of directors or officers of such other corporation are wholly or partially the same as the board of directors and officers of this corporation or by reason of the fact that such officer or director of this corporation or such firm, association or corporation is interested in such contract. And no such officer or director shall be liable to account to the corporation for any benefits which he may derive from his being so interested, provided that he discloses to the board of directors or to the executive committee the nature of his interest. And it is generally understood and agreed that every present and future officer and stockholder of this corporation shall and does assent to the terms and conditions and circumstances on or in which the said mining claims and water rights have been purchased and acquired by this corporation and the shares of stock of this corporation have been or are to be issued as aforesaid.

EXHIBIT C.

Capital Stock, \$6,250,000; Preferred Stock, \$2,500,000; Common Stock, \$3,750,000.

No. Shares

Northwestern Development Company, incorporated under the Laws of the State of Maine.

PREFERRED.

THIS IS TO CERTIFY that
is the holder of
full paid and non-assessable shares in the preferred stock of the Northwestern Development Company of the par value of \$5 each transferrable only on the books of the said Company according to its by-laws.

As more specifically provided in the by-laws of the Company the said holder is entitled to preferential cumulative dividends until dividends aggregating \$2,500,000 shall have been paid on the entire issue of 500,000 shares of preferred stock of which the shares represented hereby are a part and is further entitled upon the liquidation or dissolution of the Company to preference to the extent of the par value of the shares represented hereby. After preferential dividends aggregating \$2,500,000 shall have been paid on the shares of preferred stock as aforesaid the holders of the shares of preferred and common stock shall participate alike in all future dividends.

Reference is hereby expressly made to the charter and by-laws of the Company for a more particular description of the rights

of the holder of the shares represented by this certificate and the said holder by accepting this certificate assents to all the provisions and terms contained and specified in the said charter and by-laws.

This certificate shall not be valid for any purpose unless countersigned by the duly authorized Transfer Agent of the Company.

Witness the common seal of the Northwestern Development Company and the signatures of its president or a vice-president and its treasurer or an assistant treasurer this.....day of19...

.....Treasurer.
.....President.

Countersigned:

A, A. Housman & Co., Transfer Agents.

By.....

For Value received the undersigned hereby sells, assigns and transfers unto shares in the preferred stock of the Northwestern Development Company represented by the within certificate.
Date
Witness.....

NOTE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The Northwestern Development Company is directed by its by-laws to transfer upon its books the shares of preferred stock represented hereby to the assignee named in a written assignment thereof upon surrender of such assignment and of this certificate. No power of attorney is necessary to authorize the registration of such transfer.

EXHIBIT C1

Capital Stock, \$6,250,000; Preferred Stock, \$2,500,000; Common Stock, \$3,750,000.

No.....Shares

Northwestern Development Company, incorporated under the Laws of the State of Maine.

COMMON.

THIS IS TO CERTIFY that is the holder of full paid and non-assessable shares in the common stock of the Northwestern Development Company of the par value of \$5 each

transferrable only on the books of the said Company according to its by-laws.

As more specifically provided in the by-laws of the Company dividends on the shares represented hereby and payments in respect of such shares upon the liquidation or dissolution of the Company are postponed respectively to the dividends and payments in respect of the shares of preferred stock and the holder of this certificate by accepting the same assents to such preferences.

Reference is hereby expressly made to the charter and by-laws of the Company for a more particular description of the rights of the holder of the shares represented by this certificate and the said holder by accepting this certificate assents to all the provisions and terms contained and specified in the said charter and by-laws.

This certificate shall not be valid for any purpose unless countersigned by the duly authorized Transfer Agent of the Company.

Witness the common seal of the Northwestern Development Company and the signatures of its president or a vice-president and its treasurer or an assistant treasurer this.....day of

.....19...

.....Treasurer.

.....President.

Countersigned:

A, A. Housman & Co., Transfer Agents.

By.....

For Value Received the undersigned hereby sells, assigns and transfers unto

..... shares in the common stock of the Northwestern Development Company represented by the within certificate.

Date

Witness

NOTE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The Northwestern Development Company is directed by its by-laws to transfer upon its books the shares of common stock represented hereby to the assignee named in a written assignment thereof upon surrender of such assignment and of this certificate. No power of attorney is necessary to authorize the registration of such transfer.

United States of America, Western District of Washington, ss.

T. A. Davies being first duly sworn, on oath says: That he is the president of the plaintiff corporation in the above entitled ac-

tion; that he has heard the foregoing reply read, knows the contents thereof, and believes the same to be true.

T. A. DAVIES.

Subscribed and sworn to before me this 11th day of October, A. D. 1915.

FRED LLEWELLYN,
Notary Public in and for the State
of Washington, residing at Seattle,
Washington.

(SEAL)

Copy of within Reply received this 19th day of Oct., 1915.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

STATEMENT OF THE TESTIMONY INTRODUCED ON THE
TRIAL.

This cause coming on regularly for hearing on the merits on November 23, 1915 and thereafter, upon continuance, on November 24, 26, 30, and December 1, 1915, before the Honorable Jeremiah Neterer, Judge of the above entitled court, sitting with a jury duly empanelled and sworn, the plaintiff appearing by its attorney, William H. Gorham, and the defendant appearing by its attorneys, Messrs. Bogle, Graves, Merritt & Bogle, the following proceedings were had and testimony taken, each of the witnesses called being first duly sworn to tell the truth, the whole truth and nothing but the truth, to-wit:

Deposition of EDWARD A. PIERCE, a witness for plaintiff, taken at Portland, Maine, April 12, 1915, offered to plaintiff and received and read in evidence, as follows:

That his name was Edward A. Pierce; age forty; occupation, stock broker; residence, Short Hills, New Jersey; place of business, 20 Broad Street, New York; lived in the Eastern States; had no present intention of visiting or residing within one hundred miles of

the City of Seattle, State of Washington, within twelve months; knew the plaintiff; was formerly a director of plaintiff under its former name of Northwestern Development Company; first elected a director early in 1906; remained a director two or three years; attended nearly all if not all of the meetings of the Board, held at New York, as a director; held the office of Assistant Treasurer of the Company; first elected to that office some time in 1906; held that office until 1908; knew George Henderson of New York City, who was Secretary of plaintiff, from 1906 until his death; that Henderson has been dead for over one year; that Henderson was first elected Secretary of plaintiff in 1906; had occasion to become acquainted with him; had daily, almost daily experience with reference to identifying signatures, having large responsibility as a stock broker, owing to value of stock certificates, foreign drafts and so forth, in determining genuineness of signatures; was very well acquainted with signature of George Henderson, Secretary of plaintiff.

(Witness upon being shown paper produced and marked Exhibit D1 for identification, which includes pages 41-46 inclusive, testified:)

That he had seen those papers; that signature "George Henderson" over the title "Temporary Secretary" at top of page 42 was signature of George Henderson, former Secretary of plaintiff; witness was present at that meeting of which Exhibit D1 is a record, in his capacity as a director; that signature "George Henderson" over title "Secretary" on page 56 of Exhibit D1 was the signature of George Henderson, formerly Secretary of plaintiff; that signature "George Henderson" over the title "Secretary" at top of page 60 of paper produced marked Exhibit D2 for identification, consisting of pages 57-60 inclusive, was signature of George Henderson, formerly Secretary of plaintiff;

(Witness' attention being called to recital on page 57 of Exhibit D2 as follows:

The Secretary presented to the meeting forms of preferred and common stock certificates, and upon motion duly made and seconded, the same were approved and ordered to be spread on the records as follows, see page 67; and witness' attention being called to page 67 of paper marked Exhibit D2, forms of stock certificate, preferred and common stock, testified:)

That he recognized that form of stock certificate as form adopted by recital on page 57, and that form was the form respectively of the common and preferred stock of plaintiff.

No cross examination.

No one appearing for defendant.

Deposition of JAMES E. MANTER, a witness for plaintiff, taken at Portland, Maine, April 13, 1915, offered by plaintiff and received and read in evidence as follows:

That his name was James E. Manter; age forty-nine; residence South Portland, Maine; occupation, Manager of Corporation Trust Company; did not contemplate residing within or visiting the State of Washington, within the next twelve months; was acquainted with plaintiff, formerly Northwestern Development Company;

(Witness being shown paper marked for identification "D3" testified:)

That was the signature of the Secretary of State, Mr. Bunker, preceding the title "Secretary of State;" had seen that signature practically every day since he took office in January of this year; had correspondence with him; had occasion to consult him subsequent to such correspondence and had verified and confirmed such correspondence; had seen him sign, so that he could tell his signature as Secretary of State for State of Maine;

Had in his custody and possession the original minutes of meetings of signers of articles of agreement under corporation laws of Maine, for the plaintiff of date March 17, 1906, minutes of succeeding meetings of stockholders of plaintiff of March 19, 1906, subsequent meeting of board of directors of plaintiff of March 19, 1906, minutes of subsequent meeting of stockholders of March 29, 1906, the minutes of the subsequent meeting of stockholders of January 23, 1907, the minutes of the subsequent stockholders' meeting of January 10, 1912, stockholders' meeting January 15, 1912, and stockholders' meeting of March 1, 1912 (which witness then produced, "pages not numbered.")

(Paper produced and marked Exhibit D4 for identification and signatures on fifth page shown witness, who testified:)

That he knew those signatures; they were the signatures of the parties signing them; that he was present at time they signed them, and that constituted original Articles of Agreement in the original organization of plaintiff.

(Witness being shown the record of first meeting of signers of the Articles of Agreement consisting of six pages, produced and marked Exhibit D5, for identification, testified):

That he knew signature on second page "James E. Manter, Justice of the Peace;" that it was his signature, upon the occasion of taking the oath of Millard W. Baldwin as Clerk of plaintiff; That the signature on page 6 "Millard W. Baldwin" over the title "Clerk" is signature of Mr. Baldwin, with which he was familiar from January 1903 until latter part of 1908; and that he saw him

(Baldwin) sign that; (referring to the signatures at the bottom of page 6) that he saw those respective persons sign that;

Was present at first meeting of signers of Articles of Agreement of plaintiff; that at that meeting, the name of the Corporation was decided upon, the amount of the capital stock, and the signers were authorized to execute the certificate of organization and have the same approved, recorded and filed; they also adopted a set of by-laws; that a record was made of the transactions at that meeting; that that record was in the original record book, which had already identified as Exhibit D5; that the by-laws are next following the meeting of the signers;

(Witness shown paper marked for identification Exhibit D6, testified:)

That paper was the by-laws adopted by signers of Articles of Agreement, at the meeting of signers of said articles, concerning which he had just testified; that the words in long-hand writing "as amended January 15, 1912," on first page of Exhibit D6, shows the meeting of stockholders at which that particular section was amended; those are the original by-laws; those are the cross notations.

(Witness being shown paper entitled "First meeting of board of directors of Northwestern Development Company" produced and marked Exhibit D7, for identification, of date March 19, 1906, consisting of three pages, testified:)

That signature of James Manter, Justice of Peace, on second page was his own, signed upon taking the oath of Jas. H. Hernan, as secretary of plaintiff; that the signature at the bottom of the third page, Exhibit D7, preceding the title "Secretary" was the signature of Mr. Hernan, which witness saw him sign; was present during entire meeting of the first meeting of the board of directors on March 19, 1906; knew what transpired there; that officers were elected and treasurer's bond presented and approved; and that a record was made of the transactions of that meeting; that Exhibit D7 was identified as that record;

(Witness being shown paper entitled "Northwestern Development Company, Record of First Annual meeting" marked Exhibit D8, for identification, consisting of four pages, and shows signatures of Eaton, Hernan, Ricker, Crummett and Brophy, on second page, testified:)

Those are the signatures of the persons who were subscribers to the capital stock, that he saw them sign; that signature "James E. Manter" on fourth page of this Exhibit was his own; that signature "Millard W. Baldwin" as Clerk, was that of Mr. Baldwin, and signature at foot of page of Eaton, Hernan, Ricker, Crummett and Brophy, were signatures of the stockholders of the plaintiff; that

he was present during entire first annual meeting of the stockholders of plaintiff held on March 19, 1906; that at that meeting the original subscribers to the capital stock transferred subscription stock to qualify the gentlemen who were finally elected permanent directors of plaintiff at that meeting, the parties in interest; that a record of the transactions of that meeting was made, which witness identified as Exhibit D8;

(Witness being shown paper entitled "Northwestern Development Company, Special Meeting of Stockholders, Portland, Maine, March 29, 1906," marked Exhibit D9, for identification, consisting of four pages, and the signature on fourth page "Millard W. Baldwin" over title "Clerk," testified:)

That was signature of Millard W. Baldwin, which witness saw him sign; that he (witness) was present during entire meeting of stockholders of plaintiff on that date; that what transpired at that meeting will be shown by the record which witness identified as Exhibit D9.:

"Witness being shown paper entitled "Northwestern Development Company, Notice of Special Meeting of Stockholders" produced and marked Exhibit D10, for identification, consisting of four pages, and signature "James E. Manter" on the third page, testified:)

That was his own; and signature "Millard W. Baldwin" over title of "Clerk" was signature of Mr. Baldwin, which witness saw him sign. That he (witness) was present during entire meeting of the special meeting of stockholders of plaintiff on January 23, 1907, as proxy for A. A. Housman & Company; proxy in printed form signed by A. A. Housman & Company, duly witnessed, whose signature he knew, which proxy was not now in existence, having been voluntarily destroyed in November 1914, and that owing to the congested condition of their vaults and cellars, it was necessary for them to destroy document files belonging to all their corporations, up to January 1, 1908; that the similar records of other corporations whose business he was handling in a similar manner to this—every corporation—about 1600 in all—were likewise destroyed.

That at special meeting of stockholders of plaintiff January 23, 1907, he was present during entire time of meeting, the transactions of which will be shown by the record which witness identified as Exhibit D10; that he voted the shares at that meeting which that record recites that A. A. Housman & Company were represented by James E. Manter's proxy in the number of 768,149 shares; that the record is a true record of the transactions of that meeting; could not say that at any time subsequent to that meeting the issue to witness of that proxy by A. A. Housman & Company, was ratified and confirmed in any manner by correspondence or otherwise; was

familiar with signature of A. A. Housman & Company; the proxy was never repudiated by A. A. Housman & Company.

(Witness being shown paper produced and marked Exhibit D11, for identification, consisting of four pages and the signature "James E. Manter" over the title "Clerk" on the fourth page, testified:)

That was his own signature; That he was present at that annual meeting of stockholders during the entire time, as Clerk of plaintiff and also representing certain stockholders by proxy, as shown by the record, proxies in writing;

(Witness being shown paper produced and marked Exhibit D12, for identification, testified:)

That was Housman's proxy for that meeting; and that what transpired at that stockholders' meeting would be shown by the records which had already been identified as Exhibit D11, including the change of name of corporation.

(Witness shown paper produced marked Exhibit D13, for identification, testified:)

That was the certificate of the Secretary as to mailing notice of annual meeting of stockholders of January 10, 1912, and list of stockholders, original records from his files.

(Witness being shown signature "A. A. Housman & Co." on Exhibit D12, for identification, testified:)

That he knew signature of A. A. Housman & Co., stockholders in plaintiff at that time and that was their signature.

That it was on faith and credit of certificate of Secretary and list of stockholders that he voted the proxy as shown by Exhibit D12.

(Witness being shown minutes of stockholders' meeting of January 15, 1912, of plaintiff, produced by witness and marked Exhibit D14 for identification, testified:)

That signature "James E. Manter" over the title "Clerk" on the last page was his own;

That he was present during the entire meeting, on that date, of plaintiff, in the capacity of Clerk and as representing certain stockholders by proxy as shown by the record, same proxies which he had had at the previous meeting of which this was the adjourned meeting; that what transpired at that adjourned meeting of January 15, 1912, would be shown by the record already marked for identification as Exhibit D14.

(Witness being shown paper produced and marked Exhibit D15 for identification, record of adjourned meeting of

Annual Meeting of Stockholders, of date January 27, 1912, consisting of three pages, testified:)

That the signature "James E. Manter" on third page was his own;

That he was present during the entire meeting on that day of plaintiff in capacity of Clerk and also as representing certain stockholders as shown on the record, same proxies presented at the original meeting of which this was an adjournment.

That what transpired at that meeting will be shown by the record which had already been marked as Exhibit D. 15.

(Witness being shown paper entitled "Record of Special meeting of stockholders, March 1st, 1912" produced and marked Exhibit D. 16, for identification, consisting of sixteen pages, testified:)

That signature "James E. Manter" on last page over the title "Clerk" was his own. That he was present at that meeting in capacity as Clerk and also as representing certain stockholders by proxy in writing.

(Witness being shown paper marked Exhibit D. 17 for identification, testified:)

That signature "A. A. Housman & Company" on that paper was signature of A. A. Housman & Company, stockholders of plaintiff;

That on the strength of that signature and that proxy so signed, he voted as shown by record of that special meeting of stockholders of March 1st, 1912, of plaintiff.

(Witness being shown paper consisting of: affidavit of Secretary, Exhibit A. showing call, Exhibit B., list of stockholders, and a telegram addresses to James E. Manter, signed "A. H. Kellogg, Secy. Maine Northwestern Development Company, Seal Maine Northwestern Development Company, Inc. 1916, Maine" dated Seattle, Feb. 29, 1912, marked Exhibit D18, for identification, testified:)

That he received them in due course of mail and by wire; that on the proxy which A. A. Housman & Company forwarded to them and on the strength of the certified copy sent us by the Secretary, Mr. Kellogg, Exhibits D. 17 and D. 18, he (witness) voted by proxy at the meeting of the stockholders of the plaintiff on March 1st, 1912:

That, with reference to the transaction of the signers of the original articles of agreement of plaintiff, to the meeting of the signers of the original articles of agreement, the meetings of the stockholders and meetings of the board of directors so far as they were held at Portland, Maine, and so far as their record had been

disclosed in these papers which had been introduced for identification as exhibits, those records record all of the transactions of those several meetings. That he was present at all of the meetings to which his attention has been called and concerning which he has testified, and during the entire meetings and that he was familiar with the transactions as they took place and with the record as made.

(Witness being shown paper marked Exhibit, for identification, D. 5, on the fourth page, headed, "Subscription Agreement," testified:)

That the names "James J. Hernan, W. F. Conant, Geo. C. Ricker, J. L. Brophy, and Clarence E. Eaton" were the signatures of the people who subscribed for the subscription stock—that being the original subscription agreement and those their respective signatures which he saw them sign.

(Exhibits D. 1 to D. 18, for identification, offered by plaintiff and received in evidence and marked Exhibits D. 1 to D. 18, respectively.)

That there has been no amendment to by-law 25, a part of Exhibit D 6, as originally adopted, at any time subsequent to the adoption of that by-law.

No cross-examination.

No one appearing for defendant.

Deposition of EDWIN A. PIERCE, a witness for plaintiff, taken at New York City, New York, April 19, 1915, offered by plaintiff and received and read in evidence, as follows:

That his name was Edward A. Pierce; (age, occupation, resident, place of business were as given in his deposition taken at Portland, Maine, April 12, 1915).

Knew plaintiff; was formerly a director of plaintiff; first elected a director in 1906, remained a director two or three years; attended as a director nearly all, if not all, the meetings of the board held in New York; was Assistant Treasurer, elected to that office summer of 1906; continued to hold that office about two years; acquainted with A. A. Housman & Company of 20 Broad Street, New York; was associated with them in business in capacity of manager throughout 1906; knew A. A. Housman, who died August, 1907, during his lifetime; A. A. Housman was Treasurer of plaintiff in 1906 and 1907; his brother, Clarence Housman was elected to succeed him as Treasurer of plaintiff; Clarence Housman, Treasurer of plaintiff until summer of 1908; he was succeeded by William Ferguson, a resident of New York City; knew Henry C. Davis, former President of plaintiff, who died De-

ember, 1910; knew George Henderson of New York City, former Secretary of plaintiff, who died about two years ago.

(Witness being shown letter produced and marked for identification Exhibit E. 1; testified:)

That he first saw letter, Exhibit E. 1, in office of A. A. Housman & Company April, 1906, since which time it has, up to present time, been in that office; condition which letter now is in with respect to its condition when witness first saw it, unchanged.

(Witness being shown first paragraph, the closing of the first paragraph, the language—"I herewith enclose subscription for \$250,000 for the Northwestern Commercial Company," and being also shown paper produced and marked for identification Exhibit E. 2, testified:)

Paper, Exhibit E. 2, was received with letter of April 4th, marked Exhibit E. 1;

That he knew John Rosene of Seattle, formerly managing director of plaintiff; knew his signature; that name, "John Rosene" in the signature "Northwestern Commercial Co. per John Rosene, Pres." was John Rosene's signature; was familiar with printed form of subscription to preferred stock of plaintiff during year 1906; that Exhibit E. 2, is a copy of the form of subscription of plaintiff in use during 1906; no other form used at that time so far as he knew;

(Witness being shown telegram produced and marked for identification, Exhibit E. 3, testified:)

That he first saw that telegram on or about April 3d or 4th, 1906, in the office of A. A. Housman & Company, in whose office it has been since that time up to the present time; that its present condition with respect to the condition when witness first saw it, was unchanged;

That there was common stock transferred to A. A. Housman & Company in spring of 1906, for their delivery in accordance with the understanding contained in the last paragraph of subscription agreement Exhibit E. 2; in the neighborhood of five hundred thousand shares; that of that common stock there was a share of common stock issued for each share of preferred stock delivered on subscription, issued in the majority of instances to the subscriber of the preferred stock; in other instances partly to subscribers and partly to brokers; it was issued as a bonus under the agreement; that there was, between March, 1906, and December, 1907, on hand with A. A. Housman & Co. a sufficient quantity of the common stock so delivered to them to comply with this requirement.

(Witness being shown paper produced and marked for identification Exhibit E. 4, testified:)

That the signature at the bottom of the second page was signature of A. A. Housman & Co., in his handwriting; that the occasion of writing that letter was that it advised plaintiff of a shipment to them of that Company's records; that the shipments were made as indicated by that letter.

(Witness being shown paper marked for identification Exhibit E. 5, testified:)

That he had seen it before; that the name "A. A. Housman per E. A. P." was his signature; that statements in Exhibit E. 5, were correct at time statement Exhibit E. 5 was made and dated; that Exhibit E. 5 is the list of stockholders mentioned at foot of page 1 of Exhibit E. A.

(Witness being shown paper produced and marked for identification Exhibit E. 6, testified:)

That signature at bottom was his own; that transmissions referred to in Exhibit E. 6, were made on or about its date, as therein indicated.

(Witness being shown paper produced and marked for identification Exhibit E. 7, testified:)

That A. A. Housman & Co. were transfer agents up to about May 1, 1909, and were succeeded by the plaintiff at Seattle as understood by the witness.

(Witness being shown paper produced and marked for identification, Exhibit E. 8, testified:)

That signature attached to the foot was his own; contents of letter acknowledging receipt of telegram notifying him of appointment of transfer agent at Seattle; that the change of transfer agent was the reason of transmission of the transfer books—other records had preceded this telegram.

(Witness being shown paper produced and marked for identification Exhibit E. 9, testified:)

That transfer books referred to therein were transmitted by him as indicated in Exhibit E. 9.

(Witness being shown paper produced and marked for identification Exhibit E. 10, testified:)

That the signature at the foot of that letter was his own. That the documents and records referred to in Exhibit E. 10, were transmitted by him as therein advised to the plaintiff at Seattle.

The largest part of the 500,000 shares of common stock concerning which he was interrogated, which was issued to A. A. Housman & Company, to be delivered by them upon order of the preferred stock subscribers, was registered in name of A. A. Housman & Company.

Such part of that 500,000 shares as were required by the subscribers to preferred stock to register in their name, would not be registered in name of A. A. Housman & Company. That common stock wouldn't be subject to demand by preferred stock subscribers until they had paid their \$5. Stocks for delivery against the subscription to the preferred issue were issued in full paid form for the full amount and upon payment of the full amount of the individual installments. Transfer made of that stock rarely made into name of transferee; That A. A. Housman & Company issued proxies, as holders of common stock of plaintiff company, for voting at annual or special meetings of plaintiff; such proxies were so issued by them for meeting of stockholders of plaintiff held January 23, 1907, the nominees were the Corporation Trust Company, at Portland, Maine, Manter, James Manter, one of them.

(Exhibits E. 1 to E. 10 for identification, offered for plaintiff.)

J. L. LANDON, called and sworn as a witness for plaintiff, testified as follows:

Direct examination:

That his business was Accountant; followed that business seven or eight years; at one time associated with plaintiff in a clerical capacity, as Secretary, and as transfer agent at Seattle.

(Witness being shown paper marked Exhibit E. 4, letter dated New York, May 1, 1909, testified:)

That he saw it, notation on paper, May 6, 1909; was employed at date of letter by plaintiff, in clerical capacity, as an accountant; occasion of his examining that letter was to take care of the items mentioned therein; that he received at Seattle, in due course, on behalf of plaintiff, the articles enumerated in that letter.

(Witness being shown certificate of stock of plaintiff, Number G 101, for 160,099 shares of common stock, testified:)

That he received that certificate on or about the time he received the letter;

(Witness being shown stock ledger cards of plaintiff, testified:)

Those are the stock ledger cards referred to in that letter.

(Witness being shown paper marked Exhibit E. 5, list of stockholders, referred to in letter Exhibit E. 4, testified:)

That he got that list under separate registered cover; that the stock ledger cards referred to in letter Exhibit E. 6, on or about the date of the reception of that letter;

That nearly all this stuff—referring to items enumerated in letter Exhibit E. 4, including transfer books, came on about the same time, possibly an interval of a short time between; all received, in due course, as advised in the letter;

(Witness identified the transfer books which were shown to him.)

(Witness being shown Exhibit E. 8, letter dated May 6, 1909, letter read in evidence, testified:)

That he thought that referred to the same books which are referred to in Exhibit E. 4, where it recites: "we shall send you by express on the 3d instant the transfer books, ledger, cards, etc."

(Witness being shown Exhibit E. 9, letter of May 12, 1909, letter read in evidence, testified:)

These (the transfer books) are the books; and that the letter was received by him in due course of mail with regard to its date.

(Exhibit E. 1, letter dated San Francisco, April 4, 1906, offered in evidence, by plaintiff, objected to by defendant, objection overruled and exception noted, and read in evidence.)

Exhibit E 2, stock subscription, Exhibit E 3, telegram from Rosene to Housman;

Exhibit E 4, letter of A. A. Housman & Co. of May 1, 1914;

Exhibit E 5, list of stockholders of April 1, 1909;

Exhibit E 6, letter of A. A. Housman & Co. of May 1, 1909.

All offered by plaintiff and received and read in evidence and marked as above.)

(Ruling on Exhibit E 17 stock ledger card, offered in evidence by plaintiff, ruling reserved by the court.)

(Exhibit E 16, stock certificate No. G 101, for 160,099, shares of common stock, offered by plaintiff and received in evidence, copy of same substituted for original with consent of Court and Counsel for defendant.)

(Exhibit E 8 letter of A. A. Housman & Co. of May 6, 1909, offered in evidence by plaintiff; objected to by defendant; objection sustained by court; ruling of court on Exhibit E 8 applied by court to all correspondence with which defendant is not connected, and which has not been brought to notice of

The largest part of the 500,000 shares of common stock concerning which he was interrogated, which was issued to A. A. Housman & Company, to be delivered by them upon order of the preferred stock subscribers, was registered in name of A. A. Housman & Company.

Such part of that 500,000 shares as were required by the subscribers to preferred stock to register in their name, would not be registered in name of A. A. Housman & Company. That common stock wouldn't be subject to demand by preferred stock subscribers until they had paid their \$5. Stocks for delivery against the subscription to the preferred issue were issued in full paid form for the full amount and upon payment of the full amount of the individual installments. Transfer made of that stock rarely made into name of transferee; That A. A. Housman & Company issued proxies, as holders of common stock of plaintiff company, for voting at annual or special meetings of plaintiff; such proxies were so issued by them for meeting of stockholders of plaintiff held January 23, 1907, the nominees were the Corporation Trust Company, at Portland, Maine, Manter, James Manter, one of them.

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That his business was Accountant; followed that business seven or eight years; at one time associated with plaintiff in a clerical capacity, as Secretary, and as transfer agent at Seattle.

(Witness being shown paper marked Exhibit E. 4, letter dated New York, May 1, 1909, testified:)

That he saw it, notation on paper, May 6, 1909; was employed at date of letter by plaintiff, in clerical capacity, as an accountant; occasion of his examining that letter was to take care of the items mentioned therein; that he received at Seattle, in due course, on behalf of plaintiff, the articles enumerated in that letter.

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Those are the stock ledger cards referred to in that letter.

(Witness being shown paper marked Exhibit E. 5, list of stockholders, referred to in letter Exhibit E. 4, testified:)

That he got that list under separate registered cover; that the stock ledger cards referred to in letter **Exhibit E. 6, on or** about the date of the reception of that letter;

That nearly all this stuff—referring to items enumerated in letter **Exhibit E. 4**, including transfer books, came on about the same time, possibly an interval of a short time between; all received, in due course, as advised in the letter;

(Witness identified the transfer books which were shown to him.)

(Witness being shown **Exhibit E. 8**, letter dated May 6, 1909, letter read in evidence, testified:)

That he thought that referred to the same books which are referred to in **Exhibit E. 4**, where it recites: "we shall send you by express on the 3d instant the transfer books, ledger, cards, etc."

(Witness being shown **Exhibit E. 9**, letter of May 12, 1909, letter read in evidence, testified:)

These (the transfer books) are the books; and that the letter was received by him in due course of mail with regard to its date.

(**Exhibit E. 1**, letter dated San Francisco, April 4, 1906, offered in evidence, by plaintiff, objected to by defendant, objection overruled and exception noted, and read in evidence.)

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Exhibit E 5, list of stockholders of April 1, 1909;

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All offered by plaintiff and received and read in evidence and marked as above.)

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The largest part of the 500,000 shares of common stock concerning which he was interrogated, which was issued to A. A. Housman & Company, to be delivered by them upon order of the preferred stock subscribers, was registered in name of A. A. Housman & Company.

Such part of that 500,000 shares as were required by the subscribers to preferred stock to register in their name, would not be registered in name of A. A. Housman & Company. That common stock wouldn't be subject to demand by preferred stock subscribers until they had paid their \$5. Stocks for delivery against the subscription to the preferred issue were issued in full paid form for the full amount and upon payment of the full amount of the individual installments. Transfer made of that stock rarely made into name of transferee; That A. A. Housman & Company issued proxies, as holders of common stock of plaintiff company, for voting at annual or special meetings of plaintiff; such proxies were so issued by them for meeting of stockholders of plaintiff held January 23, 1907, the nominees were the Corporation Trust Company, at Portland, Maine, Manter, James Manter, one of them.

(Exhibits E. 1 to E. 10 for identification, offered for plaintiff.)

J. L. LANDON, called and sworn as a witness for plaintiff, testified as follows:

Direct examination:

That his business was Accountant; followed that business seven or eight years; at one time associated with plaintiff in a clerical capacity, as Secretary, and as transfer agent at Seattle.

(Witness being shown paper marked Exhibit E. 4, letter dated New York, May 1, 1909, testified:)

That he saw it, notation on paper, May 6, 1909; was employed at date of letter by plaintiff, in clerical capacity, as an accountant; occasion of his examining that letter was to take care of the items mentioned therein; that he received at Seattle, in due course, on behalf of plaintiff, the articles enumerated in that letter.

(Witness being shown certificate of stock of plaintiff, Number G 101, for 160,099 shares of common stock, testified:)

That he received that certificate on or about the time he received the letter;

(Witness being shown stock ledger cards of plaintiff, testified:)

Those are the stock ledger cards referred to in that letter.

(Witness being shown paper marked Exhibit E. 5, list of stockholders, referred to in letter Exhibit E. 4, testified:)

That he got that list under separate registered cover; that the stock ledger cards referred to in letter **Exhibit E. 6, on or** about the date of the reception of that letter;

That nearly all this stuff—referring to items enumerated in letter **Exhibit E. 4**, including transfer books, came on about the same time, possibly an interval of a short time between; all received, in due course, as advised in the letter;

(Witness identified the transfer books which were shown to him.)

(Witness being shown **Exhibit E. 8**, letter dated May 6, 1909, letter read in evidence, testified:)

That he thought that referred to the same books which are referred to in **Exhibit E. 4**, where it recites: "we shall send you by express on the 3d instant the transfer books, ledger, cards, etc."

(Witness being shown **Exhibit E. 9**, letter of May 12, 1909, letter read in evidence, testified:)

These (the transfer books) are the books; and that the letter was received by him in due course of mail with regard to its date.

(**Exhibit E. 1**, letter dated San Francisco, April 4, 1906, offered in evidence, by plaintiff, objected to by defendant, objection overruled and exception noted, and read in evidence.)

Exhibit E 2, stock subscription, **Exhibit E 3**, telegram from Rosene to Housman;

Exhibit E 4, letter of A. A. Housman & Co. of May 1, 1914;

Exhibit E 5, list of stockholders of April 1, 1909;

Exhibit E 6, letter of A. A. Housman & Co. of May 1, 1909.

All offered by plaintiff and received and read in evidence and marked as above.)

(Ruling on **Exhibit E 17** stock ledger card, offered in evidence by plaintiff, ruling reserved by the court.)

(**Exhibit E 16**, stock certificate No. G 101, for 160,099, shares of common stock, offered by plaintiff and received in evidence, copy of same substituted for original with consent of Court and Counsel for defendant.)

(**Exhibit E 8** letter of A. A. Housman & Co. of May 6, 1909, offered in evidence by plaintiff; objected to by defendant; objection sustained by court; ruling of court on **Exhibit E 8** applied by court to all correspondence with which defendant is not connected, and which has not been brought to notice of

defendant, i. e. Exhibits E 4, E 6, E 8, E 9, and E 10; Exhibit E 1 not included in this ruling but permitted to stand.)

(No cross examination.)

(Witness excused.)

A. H. KELLOGG, called and sworn as witness for plaintiff testified, as follows:

(Direct examination.)

That his business was transportation; connected with Alaska Lighterage & Commercial Company, Secretary of plaintiff since January, 1910;

(Witness being shown first minute book of plaintiff, which was identified in deposition of Edward A. Pierce, at Portland, Maine, testified:)

That it was the first minute book of directors and stockholders of plaintiff, first seen by witness in office of plaintiff in 1910; that on page 40 was a transfer of subscription to stock from W. F. Crummett, James J. Hernan, George C. Ricker, J. L. Brophy, and Clarence E. Eaton, to John Rosene, six shares.

(Transfer of 6 shares dated March 20, 1906, offered in evidence by plaintiff.)

That he recognized signature on page 40 of minute book as that of John Rosene, that he had seen it a great many times, had seen him (Rosene) sign it.

Cross examination:

Think in 1908 saw Rosene sign his name to several documents; was not present when Rosene signed on page 40 (of minute book); didn't know when he signed it.

(Sufficiency of proof of signature of Rosene on page 40 of minute book objected to by defendant.)

JOHN ROSENE called and sworn as a witness for plaintiff, testified as follows:

(Witness being shown on page 40 of minute book of plaintiff, referred to Exhibit E. 21, name "John Rosene" testified:) That he believed that was his signature.

(Transfer on page 40 of plaintiff's minute book offered in evidence by plaintiff, received in evidence and marked Exhibit E. 21.)

(Minutes of meeting identified by witness Manter as minutes of meetings of signers of articles of incorporation,

the stockholders and board, at Portland, Maine, and subsequent minutes as identified by witness Pierce of the meetings of the board, of plaintiff, offered in evidence by plaintiff, objected to by defendant as incompetent, irrelevant and immaterial, being the record of plaintiff that defendant had no connection with; objection overruled by the court.)

(Plaintiff introduced in evidence Exhibit D. 4, certificate of organization of plaintiff.)

Exhibit D. 5, minutes of meeting of signers of articles of incorporation.

Exhibit D. 6, minutes showing adoption of By-Law No. 3, By-Law No. 6, By-Law No. 9, By-Law No. 25.

Exhibit D. 7, minutes of first meeting of plaintiff's directors on March 19, 1906.

Exhibit D. 8, minutes of first annual meeting of plaintiff's stockholders at Portland, Maine, on March 19, 1906.

Exhibit D. 2, minutes of meeting of board at New York, March 21, 1906.

Exhibit D. 9, minutes of meeting of stockholders March 29, 1906, at Portland, Maine.

Exhibit D. 10, minutes of stockholders' meeting of January 23, 1907.

Documents as offered are received in evidence and marked as above.

No cross examination.

Witness excused.

A. H. KELLOGG, witness for plaintiff, recalled, testified as follows:

(Witness being shown Exhibit D. 11 minutes of meeting of stockholders of January 10, 1912;

Exhibit D. 14, minutes of stockholders' meeting in Portland, Maine, January 15, 1912, and being shown book of minutes of plaintiff, testified:)

That was the minute book of stockholders and directors of plaintiff, kept in its Seattle office.

(Witness being referred to minutes of board meeting. January 22, 1912, testified:)

That he was present at that meeting; that the resolutions and motions and transactions of business were duly had as described

in those minutes; that was a true minutes of the meeting of the board at that time, authorizing the corporation to do business in state of Washington, and of appointment of statutory agent under laws of state of Washington, and authorizing necessary papers from state of Maine to be filed in office of Secretary of State of state of Washington, and levying assessment No. 1 for 20 and of No. 2 for 50 per cent of the subscription, on the subscriptions for the preferred stock, and providing for a credit on those assessments to those subscriptions where the subscribers had paid any part of the amount sought to be realized by those assessments; notice of which meeting was given to all the directors;

(Witness shown paper marked Exhibit S. 1½ for identification, testified:)

That was a notice to the plaintiff's directors of a special meeting of board of directors to be held at 4 o'clock P. M. on 22d day of January, 1912, signed by the President; followed by the acknowledgement of notice from each and every director; that that was the signature of President on that date and of all the directors; and that paper was in existence as witness then saw it of date of that meeting.

(Notice as Exhibit S 1½ minutes of board of directors of January 22, 1912, as Exhibit S. 1, offered in evidence by plaintiff.)

Cross examination.

That witness procured the signatures to those notices, on date of notice January 20, that would be date it was signed; all directors were resident in Seattle, they were all here present in the city at that time; Mr. Loewenherz was a resident of Seattle; M. C. Farr lived here; D. C. Young lived here in 1912; that he remembers that he got the signatures of all those parties before the date of that meeting on the 22d.

(Documents received in evidence and marked respectively Exhibits D. 11, D. 14, S. 1, and S1½.)

(Certificate of Secretary of state of State of Washington, showing compliance with laws of state of Washington, relating to a foreign corporation doing business in state of Washington, change of corporate name and increase of directors, appointment of statutory agent, offered in evidence by plaintiff, received in evidence and marked Exhibit F.)

(Examination of witness continuing:)

That he knew of giving of notice of assessments No. 1 and No. 2, as levied by meeting of board as above;

(Witness being shown paper marked for identification Exhibit S. 2, identified them as affidavit of witness as to his mailing, by registered mail, to defendant, notice of assessment No. 1, notice of credit of assessment No. 1, and notice of assessment No. 2.)

(Witness being shown paper marked for identification Exhibit S. 3; identified same as receipt for those registered notices, secured by witness at that time; that papers "A," "B," "C," attached to the affidavit are true copies of the notices sent in registered mail, notices of assessments No. 1 and No. 2, due under their stock subscription and of the credit of No. 1, where they had paid up.)

(Documents offered in evidence by plaintiff and received in evidence and marked Exhibits S. 2 and S. 3.)

(License issued by state of Washington to plaintiff, offered in evidence by plaintiff, received in evidence and marked Exhibit F. 1.)

(Stipulation between plaintiff and defendant dated November 2, 1915, and 4 transfer books offered in evidence by plaintiff, received in evidence and marked respectively, Exhibits E 11, E 12, E 13, E 14, and E 15.

(Examination of witness continuing:)

Re-direct examination.

Those are the transfer books of plaintiff now in possession of plaintiff, and were at the date of the stipulation above.

(Issues of stock as shown by transfer books to parties therein named on pages 1 and 2 put in evidence.)

(Certified copy of certificate of incorporation of defendant offered in evidence by plaintiff, received in evidence and marked Exhibit F. 2.)

Witness excused.

E. J. MATHEWS, called and sworn as a witness for plaintiff, testified as follows:

Was a director of plaintiff in February 1910; resigned as President in January, 1910.

No cross examination.

Witness excused.

T. A. DAVIES, called and sworn as a witness for plaintiff, testified as follows:

Am President of plaintiff, have been such since 1910; was President on February 4, 1910;

(Witness being shown letter marked Exhibit E. 10, in the Pierce, New York, deposition, testified:)

That he had seen that letter before;

(Witness being shown books, journal, cash book and ledger marked for identification, Exhibits E. 18, E. 19 and E. 20, testified:)

Those books were the ones referred to in letter; were received by him shortly after date of that letter from the New York office.

(Books marked respectively Exhibits E. 18, E. 19 and E. 20.)

No cross examination.

Witness excused.

CHARLES A. McMASTERS, called and sworn as a witness for plaintiff, testified as follows:

That he was Secretary of defendant; such Secretary since April 1, 1911;

(Witness produces minutes of defendant's stockholders' meetings, board of trustees' meetings and executive committee meetings, testified:)

Those are the minutes of defendant covering the minutes of April, May, June, July, August and September, 1906; all of the minutes; was not connected with the Company at that time; were delivered over to him by his predecessor as entire books of defendant;

(Witness being shown minutes of meeting defendant's board of trustees, of date April 12, 1906, testified:)

J. D. Trenholme, Secretary, signed those minutes; recognized his signature;

(Witness reads in evidence minutes referred to).
(and testified:)

He had read all of minutes of defendant's board of trustees of April 12, 1906; from beginning to end, as they appear of record;

(Record, minutes of defendant's board of trustees of April 12, 1906, offered in evidence by plaintiff.)

(Upon examination by Mr. Graves, counsel for defendant, testified:)

He was not Secretary at that time; Mr. J. D. Trenholme, then present in court room, was the Secretary at that time; had no personal knowledge whatever whether or not those minutes record everything that took place on that day; only what he heard; had no personal knowledge whether or not anything was expressly withheld at request of anybody from the minutes; was not connected with the Company at that time.

(Mr. Graves, counsel for defendant, contended that before minutes go before the jury, the Secretary, who was present and took down the minutes, should be called as a witness and allowed to testify as to what occurred;

The court ruled: those minutes being produced in response to an order issued to defendant to produce it, at least prima facie, and if they are not the minutes, then it can be shown;

Defendant withdraws all objections to minutes with express understanding defendant be allowed to call Secretary to show exactly what occurred at that meeting;

The Court: The objection is overruled. Minutes admitted as Exhibit G.)

(Witness being shown minutes of defendant's board of trustees of September 5, 1906, date when counsel for defendant in his opening statement stated that this matter again came up before board, identified as Exhibit H, witness read in evidence, same as follows:)

"RESOLVED That the President be authorized to subscribe to the stock of the Northwestern Development Company for this Company in the sum of One Hundred and twenty-five thousand dollars."

"WHEREAS It is necessary to provide funds to build and purchase additional steamers for the Companies' use; RESOLVED that the President be instructed to sell and dispose of the stock

held by this Company in the Northwestern Development Company down to Fifty thousand dollars."

(Witness continuing:)

Those were the only minutes found under that date of defendant's board of trustees; were produced there by him by reason of an order of court served upon him;

(Witness being shown minutes of defendant's board of trustees of April 10, 1907, identified as Exhibit I, read in evidence, that part that referred to the stock subscription, in evidence as follows:)

"Resolved, that this corporation does hereby affirm its subscription for the capital stock of the Northwestern Development Company in the sum of \$125,000, par value, and no more and the attorney of the company be and he is hereby authorized and directed and required to prepare the necessary notice to be sent by the Secretary to the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription for the capital stock of that company was ever authorized in any sum or sums whatever except for \$125,000.

Moved by Mr. Eccles that the resolution be adopted which motion received a second. A vote being taken, all of the members present voted for the resolution and none against it and it was declared adopted."

That there were minutes of defendant's board of trustees between April 12, 1906, and September 5, 1906; trustees met on April 18; no reference whatever in minutes of that meeting to subscription of defendant by John Rosene to preferred shares of plaintiff's stock; John Rosene was present at that meeting; meeting of trustees May 7, 1906; no reference whatever in that meeting to the subscription referred to; meeting of May 14, 1906, nothing in that meeting with reference to that subscription; meeting of trustees July 10, 1906, Rosene present, a quorum of board—nothing there in reference to that subscription; meeting of July 20, John Rosene present, nothing there in reference to that subscription; next meeting was on September 5, 1906.

(Witness being shown minutes of meeting of defendant's executive committee of September 18, 1907, witness read in evidence a resolution there with reference to a proxy as follows:)

"Upon motion, resolved that this Company's proxy be forwarded to Mr. S. W. Eccles to represent this company at a special stockholders' meeting of the Northwestern Development Company to be held at the office of said corporation at 281 St. John St..

Portland, Maine, October 3, 1907, at 10 o'clock, A. M., said proxy to be given with power of substitution."

(Witness continuing:)

Mr. Eccles, there referred to, was a director in the Company at the time;

(Witness read in evidence a further resolution there with reference to this stock, as follows:)

"Upon motion, resolved that the Treasurer of this Company be instructed to have this Company's stock in plaintiff Company reissued in name of defendant."

(Minutes of April 10, 1907, marked Exhibit J. minutes of September 18, 1907, marked Exhibit K.)

Further proceedings adjourned until the following day, November 24, 1915, at hour of 10 o'clock A. M.

November 24, 1915, 10 o'clock A. M.

Continuation of proceedings pursuant to adjournment, all parties present, names of jurors called, all present.

(Plaintiff offered in evidence:

Exhibit D12.

Exhibit D13.

Exhibit D17.

Exhibit D18.

attached to Manter deposition.)

MR. A. H. KELLOGG recalled as witness for plaintiff, testified as follows:

(Witness being shown affidavit signed A. H. Kellogg, of 29th day of December, 1911, Exhibit D 13 attached to the Manter deposition, testified:)

That was his signature; that he swore to it on the date given before a Notary Public; that the statements therein contained were true;

(Affidavit, Exhibit D 13 read in evidence by witness.)

(Witness continuing;)

That the notice and list of stockholders were attached; that was a true list of the stockholders of date of affidavit, with number of shares, common and preferred, held by each, as shown by the books of the Company; that he verified it at that time; that there

had been no further original issue of preferred stock since the affidavit was made.

(Witness being shown a further affidavit signed A. H. Kellogg, of date February 8, 1912, testified:)

That was his signature; that he swore to that and statements therein contained are true.

(Witness read in evidence, affidavit Exhibit S 2:)

(Witness continuing:)

The annexed papers, actually attached, were: Exhibit A. notice of special meeting of stockholders of plaintiff to be held first day of March; Exhibit B was list of stockholders to whom notice of the special meeting was sent on January 29, 1912; the telegram certifying names of plaintiff's stockholders as per list of date February 29, 1912, was sent by him; that statements therein contained were true and were true at that time.

(Documents received in evidence marked Exhibits D. 12, D. 13, D. 17 and D. 18.)

Cross examination:

He took list of stockholders from the books of company; it is a complete list of all stockholders appearing on books of plaintiff; it shows number of shares held by each stockholder, as of record, at that time and total number of outstanding shares both of preferred and common stock; preferred stock outstanding at that time 339,890 shares; common shares outstanding 750,000; the 339,890 of preferred was at \$5 per share; that was all of the preferred shares that books show had ever been issued; not all of preferred shares that books show had ever been subscribed for; stock subscriptions were more than stock issuance; could not say off-hand what was total stock subscription; would have to refer to the records; had a tabulated list of that; about one million six hundred odd thousand dollars; there had been no subscription since then; total of preferred stock had never been subscribed for.

(Examination by counsel for plaintiff:)

Was not attempting to be accurate as to figures concerning which Mr. Bogle (for defendant) asked him; said he could not recall the exact figures from memory.

(Cross examination resumed:)

He did know that all the preferred stock had not been subscribed for.

(Plaintiff offered in evidence Exhibit D. 16 minutes of special meeting of its stockholders of March 1, 1912;

Objected to by defendant.

Court reserved its ruling.

Document marked Exhibit D. 16 for identification.)

(Plaintiff offered in evidence Exhibits T. 1, T. 3, T. 4, T. 5;

Objected to by defendant.

Court reserved its ruling.)

CHARLES A. McMASTERS, recalled as a witness for plaintiff, testified:

(Witness being shown minutes of meeting of defendant's stockholders of April 18, 1906, testified:)

He did not find anything there which refers to that subscription; nothing in minutes of stockholders' meeting of April 18, 1906, with reference to that subscription.

(Witness being shown minutes of regular meeting of defendant's executive committee on 4th of September, 1907, first meeting of that committee that month, testified:)

That those minutes had no reference to John Rosene except that Rosene was appointed one of a committee to adjust salaries and minor matters; that there was a special meeting on 9th of September, which had no reference to John Rosene;

(Witness being shown minutes of Executive Committee of defendant of October 23, 1907, at request of plaintiff, read same in evidence; objected to by defendant. Objection sustained by court; jury instructed not to consider at that time minutes as last read; exception noted for plaintiff.)

(Witness continuing:)

That he was treasurer of defendant; had been such since April 1, 1911; as such was Custodian of its assets;

As such had in his possession capital stock of plaintiff held and owned by defendant;

(Witness produced it.)

That there were 25,000 shares of preferred stock and 25,000 shares of common stock of plaintiff; that stock when he assumed office of treasurer, was in New York, that he received the stock in July, 1915; that it had not theretofore been in his possession as treasurer.

(List of stock last aforesaid showing number of shares the series number, date of issue, amount of shares of each certificate, as follows:

Preferred Stock				Common Stock			
Issued			No. shares	Issued			No. shares
Certificate No.				Certificate No.			
F 6	June 9th, 1906	.....	1000	F 15	June 9th, 1906	.....	1000
F 7	July 24th, 1906	.....	1000	F 24	July 24th, "	.....	1000
F 8	" " " " " " " "	.....	1000	F 25	" " " " " " " "	.....	1000
F 9	" " " " " " " "	.....	1000	F 26	" " " " " " " "	.....	1000
F 10	" " " " " " " "	.....	1000	F 27	" " " " " " " "	.....	1000
F 11	Nov. 7th, " " " " " " " "	.....	1000	F 43	Nov. 7th, " " " " " " " "	.....	1000
F 12	" " " " " " " "	.....	1000	F 44	" " " " " " " "	.....	1000
F 13	" " " " " " " "	.....	1000	F 45	" " " " " " " "	.....	1000
F 14	" " " " " " " "	.....	1000	F 46	" " " " " " " "	.....	1000
F 15	" " " " " " " "	.....	1000	F 47	" " " " " " " "	.....	1000
G 37	April 2nd, " " " " " " " "	.....	10000	G 52	April 2nd, " " " " " " " "	.....	2000
G 38	" " " " " " " "	.....	2000	G 53	" " " " " " " "	.....	10000
G 41	" " " " " " " "	.....	3000	G 55	" " " " " " " "	.....	3000
			25000				25000

All issued to A. A. Housman & Co.

All endorsed as assigned to NORTHWESTERN COMMERCIAL CO. under date of September 24, 1907.

Offered in evidence by plaintiff, in lieu of stock certificates themselves; objected to by defendant;

(Witness continuing:)

Assumed office of Secretary at same time he assumed office of Treasurer; had a list of records of office of secretary turned over to him at that time.

(Witness producing list.)

That stock was not enumerated among the items in that list; that he received the minute book at that time; received no memoranda or data at all purporting to be any part of the minutes other than as contained in the book he had identified that and the previous day, there was no paper or data exclusive of the papers contained within the covers of those minute books identified as minute books of company, pertaining to the minutes of the company; received the entire file of the correspondence of defendant as secretary, was turned over to him; did not think it true that only vouchers appertaining to claims for damages or records of wrecks, and that correspondence was not turned over to him; made a demand for entire records of office of secretary and was assured by Captain Jarvis that everything in his possession at that time was turned over to him (witness); did not turn over anything he did not have in his possession; he (Captain Jarvis) did not state

that there were formal records of the company which were not then turned over to witness, and made no reference to them.

Cross examination.

The stock he spoke of in plaintiff was all issued in name of A. A. Housman & Company; it all bears the endorsement on the back of the certificate of transfer by A. A. Housman to the defendant under date of September 24, 1907; that is true of all those certificates;

(Witness is asked by counsel for defendant in making his memoranda to give the date of the issuance and date of the transfer.)

Those (certificates of stock) did not come into his actual manual possession until this last summer in July; was requested and served with same notice by Mr. Gorham to produce them; he then asked for them and they sent them to him; the stockholders' meeting of April 18, 1906, he was asked about, was the annual meeting—the record shows; the general annual meeting of the stockholders of defendant; did not find any reference to any subscription to stock in plaintiff in minutes of stockholders' meeting of April 18, 1906; those minutes do contain a fairly full detail report from the President to the stockholders of all of the large investments of the Company; did not find any reference to any investment in plaintiff.

Witness excused.

W. T. FORD called and sworn as a witness for the plaintiff, testified as follows:

He was the auditor of defendant, had been such since spring of 1909; was not identified with the Company prior to that time; had the account books of defendant there in court with him.

(Witness requested to turn to Journal of April, 1906, and see if he had any entry there of date of April 21, 1906, Northwestern Development Company \$50,000, testified:)

No entry at all; on that date; there are some on April 18, to Northwestern Development Company; don't know what the item is; two items of \$20,000; there is an item of \$50,010, April 30th; that was simply a transfer crediting the plaintiff with \$50,000 and charging "investment;" just shows among the investments, does not say there what kind of an investment, does not show the character; no where in the record anything to indicate as to the character of that investment of \$50,000; didn't think it was a fact that it was lost to the stockholders as to where that money went to,

further than that it was a mere investment; the books showed that it was an investment; didn't know whether it was lost to them or not; could not say that so far as the identity of the particular thing in which the money was invested, it was lost, knowledge to the Company lost, don't know; had no voucher No. 101 of July 15, 1901; had voucher No. 5366 which plaintiff's counsel wanted; that represents \$25,000; it shows that the plaintiff was credited with \$25,000 and investment account was charged with it, date of voucher July 15, 1906; No. 5366; there was an entry on Journal September 6, for \$25,000 for amount of stock subscription charged to Investment account and credited to account of plaintiff; carried from journal into plaintiff's account in ledger; that ledger account was an open current account;

(Witness produces his ledger account of Northwestern Development Company, which is marked for identification Exhibit K 1:)

On this ledger account of defendant with Northwestern Development Company, there is a credit item of April 30, 1906; of \$50,010, marked "investment"; he put that in there himself; on July 15, an item of of \$25,000 credited Northwestern Development Company, also "investment"; those items, that "investment" was put by him to identify the item; knew that the corresponding charges were in the investment account; those items represent the investment of that subscription so far as there was any subscription; on September 6, 1906, a credit of \$25,000 investment; on September 15, 1906, \$25,000 capital stock purchased, that is what it says; that refers to the entry on the ledger of September 25; the entry is posted in the Journal September 15 and it says "capital stock purchased September 15, 1906; that shows what it is for; he did not make the entry; he was reading the entry; entry entered September 25; it is a corresponding entry to the entry in the ledger; did not have the balance sheets of September 30, 1906; they were not turned over to him by his predecessor;

(Counsel for plaintiff asks Mr. McMasters if the balance sheets are in court, they were included in the order directing defendant to produce the balance sheets of the several months and the order was served on Mr. McMasters as Secretary:)

The witness:

He examined all the records of the Company and could never find any balance sheets of the dates which counsel for plaintiff mentioned there anywhere; had a monthly balance sheet, did not keep them at that time; didn't know whether there was a monthly balance prior to his advent into office; would not say there was not; did not know; the entries he had referred to would be carried into the balance sheets of the several months in the ordinary course

of bookkeeping; did not have the annual report of defendant of April 30, 1906; could not find a copy in his office.

(McMasters: I made a thorough search and could not find it.)

(Witness continuing:)

Had no record which would show the summary from which an annual report would be made in 1906, for the fiscal year; had the annual report of year 1907; thought he had it there among the papers; didn't seem to have them there;

(Witness is shown a paper by counsel for plaintiff,)

That is a copy of it; that is the same thing;

Here is the one.

(Witness producing copy of annual report of defendant for year ending April 30, 1907, marked Exhibit M.)

Identified it as report of defendant for April 30, 1907; that is what it says on the front of it; found among the Secretary's files.

(Counsel for defendant presumed it is the annual report, had no reason to question it.)

(Witness continuing:)

Might identify the items under column Northwestern Commercial Company stock holdings in other companies \$993,012.50 if he had time to check it up; could not tell; it does not show an exact balance; did not have balance sheet of defendant of July 31, 1906, or August 31, 1906, or September 30, 1906; did not know whether there were any such balance sheets in existence; so far as he knew they were not in his office; had made a personal search;

(Document marked for identification M. offered in evidence by plaintiff: received in evidence and marked Exhibit M.)

Cross examination.

So far as he had been able to find, those balance sheets similar to ones which he had produced, were not kept prior to 1907, could not find them; was not connected with Company until 1909 in spring; item of \$50,000 as Exhibit K1, is the entry on the ledger account of plaintiff on books of defendant; there was no reference in the journal entry which shows what makes up that \$50,010; it does not show—reference to journal 394—what makes it up; the memorandum attached to voucher No. 5366 of July 15, 1906, of

\$25,000, was attached to it when he first found the voucher on the files of the company; in the same condition as it was then.

(Voucher No. 5366 with attached memorandum offered in evidence by defendant, received in evidence as part of cross examination, and marked Defendant's Exhibit No. 1; and read in evidence to jury:)

(Witness continuing:)

The books of record show M. M. Perl was the Auditor of defendant in 1906; knew his signature; had seen it; that is Perl's signature to the memorandum at the bottom; had never seen Mr. Rosene write his signature but have seen checks and other documents; knew his signature; the signature to the memorandum above "J. R." is in his handwriting; the books would show at what time this entry was actually made; there is nothing there from which he could determine when the entry was actually made or when those instructions came into his hands; could not say; there is no other entries on the books throwing any further enlightenment on the journal entry, investment Northwestern Development Company capital stock purchased September 15, 1906, \$25,000;

It refers to page 15; the other credit of \$25,000 referred to is entered under date of September 6, 1906; so that those two items, together with the \$25,000 which is represented by these vouchers No. 5366, apparently make up the \$75,000 which was received, for which the Development Company received credit on the books of defendant;

Redirect examination.

This (Exhibit K1) was a mutual open current ledger account; In following October, 1906, there was a balance struck on that ledger account, in favor of plaintiff, in sum of \$32,232.78; balance was settled by check payable to plaintiff delivered by defendant to plaintiff; all these are credits; that included all the credits on the plaintiff's account and this check closed the account.

Recross examination:

On August 31, the account shows a balance of \$57,692.23 in favor of defendant; that is, after crediting the \$25,000 under date of July 15, on August 31 the plaintiff still owed defendant fifty thousand and some odd dollars; subsequent to that, those other two entries of \$50,000 were made;

Witness excused.

JOHN ROSENE, recalled as a witness for plaintiff, testified:

(Witness shown paper marked for identification, Exhibit L.)

That was his handwriting and his signature attached and signed thereto; that paper was addressed to Northwestern Commercial Company, date, October 30, 1906; that, apparently, he was in New York then; that was the letter head of defendant; could not say that was addressed to defendant concerning its business until he read it;

That this letter was addressed to the N. W. C. Co. but it really should be addressed to plaintiff;

Witness understood that it came to defendant but the officers of the two companies were together and the bookkeepers were the same but it was not the Commercial Company's business; it was the Development Company's business it referred to.

That he was President of defendant at that time; that Mr. Trenholme was secretary; that Mr. George Henderson was not fiscal agent; that Mr. Henderson had had that printed without witness' authority, but it did not amount to that; he was not the President, he was the Secretary of the plaintiff; and not the fiscal agent of the defendant; he was the secretary of plaintiff company but he was not the agent of the defendant.

(Witness shown letter marked for identification Exhibit N:)

That was his (witness') signature attached to that letter; would think that letter was sent to Henderson, secretary of plaintiff, on or about the date it is dated, it looked that way.

Letter offered by plaintiff and received in evidence and marked Exhibit N.

Cross Examination.

That letter was not written by witness with the knowledge of the defendant's board of trustees; they did not know anything about that; the statement in the letter that \$50,000 of the \$60,000 par value preferred stock is to be credited on the \$245,000 due witness from the company (plaintiff) on the mining property purchased by the plaintiff referred to the \$245,000 cash that was actually paid to the owners of the mining claims for the claims and alleged water rights, etc; that was the same purchase which is referred to in the minutes of the plaintiff which had been introduced in evidence here, which was evidenced by some agreement between witness and the plaintiff.

Witness excused.

Thereupon at request of plaintiff the Clerk of the Court produced a stipulation between the parties to this suit relative to the amendment of a former complaint of plaintiff and to the amend-

ment of defendant's answer to such former complaint, dated May 11, 1914, which plaintiff thereupon offered in evidence as tending to show a delivery of this stock by plaintiff to defendant, during the year 1906, as an extra-judicial statement made at the time, that this stock was delivered by plaintiff to defendant between April 4, 1906, and November 9, 1906, to which defendant objected and which objection was sustained by the court to which ruling of the court plaintiff excepting and its exception was allowed.

Thereupon plaintiff offered in evidence paper marked Exhibit D 3, attached to the Manter deposition heretofore read in evidence, being certificate of the Secretary of State of the state of Maine that the certificate of authorization, was filed, certificate of change of corporate name, and certificate as to increase of number of directors, of plaintiff, which was received in evidence and marked Exhibit D3.

WILLIAM T. FORD recalled as witness for plaintiff, testified:

That he has not made examination which counsel for plaintiff had asked him to make; that he would made it.

No cross examination.

Witness excused.

J. D. TRENHOLME, called as a witness for plaintiff and sworn, testified:

That his name was J. D. Trenholme, was formerly secretary of defendant, he thought up to the spring of 1907, from its inception.

(Witness showed paper marked for identification Exhibit N1:)

That it looked like one of the statements of defendant for the fiscal year, March 10, 1905, to April 30, 1906; that he would say there was an annual statement made at that time; that he presumed he signed it as secretary, that he usually did those things; that the statement was made up by their auditor; that it was never his custom to go into the accounting department and verify any of these statements—the signing of them by him was just simply,—prefunctory duty;

That the auditor prepared these annual statements, prepared all their statements; that sometimes they were for distribution among the stockholders, sometimes not; didn't think that these annual statements were mailed out to every stockholder they had. it was the usual custom in those early days;

(Witness asked; were they handed out to the stockholders holding a majority of the stock.)

That it was a long time back;

That it (Exhibit N-1) was addressed to the stockholders; which would indicate on its face that it was addressed to all of the stockholders.

(Witness asked: Did he recognize that as one of the statements which was issued at that time.)

That he would say that it was, yes;

(Witness' attention called to the item on Exhibit N-1, of capital assets as per company's books, April 30, 1906 \$2,917,-532.96, and witness asked if he knew what that item consisted of, generally speaking.)

That they had a number of subsidiary companies; and it would be the stock, the investment in the stock in these other companies and investments in various enterprises that they were interested in at that time; if it were accurate he thought it would include all the investments of his company; and if they had on their books an investment of \$50,000 in April 1906, in the plaintiff's stock, it would be included in that item; did not know without referring to the books whether they did have it or not.

(Plaintiff offered in evidence Exhibit N-1;)

Examination by defendant.

That he could not identify this Exhibit N-1 by any signature on it; that he had not any personal recollection about it at all, any more than it was customary always to get out an annual report at every annual stockholders' meeting; did not know positively whether this was the one that was gotten out at that time, but would say that it was; said so because it purports to be a report of that kind, that was all; he would not expect to get up one unless it would be a real one; they were always gotten up by the auditor, by their bookkeeping department, that as secretary of the board of trustees he verified the statements to see what items made up the items that were shown on the aggregate, their statements that was prepared would show that—that was simply a consolidation of a great mass of figures; that was boiled down to three or four or five or six items, while in their general statements which would be prepared for verification, all those items would be segregated.

Paper received in evidence and marked Exhibit N-1.

Thereupon plaintiff offered as a part of the examination of Mr. Kellogg, with the consent of counsel for defendant, statement of plaintiff in re. stock subscription preferred, showing the original subscription and the amount of outstanding preferred stock as per ledger.

Paper received in evidence and marked Exhibit N-2.

Witness excused.

WILLIAM T. FORD, recalled as a witness for plaintiff, testified:

That the result of his investigation was that the item of \$993,-012.50 shown here as stocks in other companies includes \$125,000 counsel for plaintiff asked about.

That he could not tell whether or not in item of capital assets \$2,907,532.96 in the annual report of 1906, Exhibit N-1, includes the item of \$50,000 which he had testified was found in his ledger as an investment of his company in plaintiff's stock in April 1906; he couldn't prove that; this was the whole consideration, you would have to have another balance sheet to prove that, it was made up in a different form from that; his books were here (in court) did not know whether he could ascertain whether or not his books showed such capital assets without a lot of additional record here. He supposed of course, that it was; that he could not prove that without getting all the books and a complete balance from that date and he doubted if he could do it; the books were not all there; the ledger was a loose leaf ledger and hundreds of accounts had been transferred from time to time out of it and he didn't know whether he could possibly get them together to prove that.

Witness excused.

MORITZ THOMSEN, a witness, called and sworn on behalf of plaintiff, testified:

That his business was that of flour manufacturer; the Centennial Mill Company, of which he was President, for 26 years, since its inception; that its output ran from 11 to 14 million barrels a year; that he was a resident of Seattle for 17 years; was associated with defendant in 1906 as a director; didn't remember when he first became a director; it was prior to April 1906; was a stockholder at that time; was present at a meeting of defendant's board in early part of April 1906, at which, Rosene, President of defendant, reported having made subscription on behalf of defendant to preferred stock of plaintiff in sum of \$250,000; at that meeting as far as he remembered, every member outside of Rosene took the stand that Rosene had no legal right to subscribe and, therefore, they would not recognize it, and he (Rosene) asked us as a matter of courtesy to him to not put anything in the minutes; that he (Rosene) would dispose of the stock in a few days and then call us together again; that a payment of \$50,000 on that subscription was reported at that time;

That he would not say that there was any action of the board with respect to that payment, except they claimed he had no right to pay it.

That his idea was that Rosene claimed that he could dispose of the stock and he (witness) presumed that he (Rosene) knew what he was doing and that he knew what he could do and that he would dispose of it in a few days.

(As to what was done with relation to the \$50,000) He was not sure but what personally he made the remark that if that proposition was such a good one as Rosene stated, that it might be well for the Company, perhaps, to keep the \$50,000; didn't know if anybody concurred in his attitude; couldn't remember whether Captain Jarvis concurred with him; no action taken upon his suggestion that the Company keep the \$50,000; no motion made by trustee present and put by chairman and disposed of by a vote of the trustees; affirming or disaffirming the contract; no resolution offered; Rosene asked us not to put anything on the minutes; there was no motion or resolution offered; could not anything go on the minutes until some action had been taken by the trustees; as to whether the board adjourned without taking action; didn't know how to construe that; some persons might say they took action—if everybody expressed themselves, whether that would be action or not; didn't know; know that everybody expressed themselves very strongly that the Company would not take this stock; nothing was put on the minutes; there was no minutes; there was nothing done by the trustees further than expressing themselves in the way he said;

Answering for himself he would say that the members of the board adjourned with the expectation of having the matter again come before the board at a subsequent meeting; and that the next meeting of defendant's board of trustees at which the matter of this subscription was discussed was some time in the fall of 1906, could not say the date; at which latter meeting he introduced a resolution as follows:

“Resolved that the President be authorized to subscribe for stock of the Northwestern Development Company for this Company in the sum of \$125,000.”

Cross Examination:

That at the April, 1906, meeting (of defendants' board) he thought there were present; Mr. Trenholme, Mr. Treat, Mr. Trimble, Mr. Rosene and himself; was not sure but Mr. L. Grunow was there; could not say for sure whether Mr. Jarvis was present; supposed the record would show; didn't recollect, would not say whether Mr. Hartman was present at that meeting; Hartman was defendant's attorney at that time; at that meeting, all of the trustees with exception of Mr. Rosene, expressed themselves that they would not take this stock for defendant in plaintiff company; that was the decision of all of them, if you go by what men say;

there was no difference between them on that; and he expressed that; that Mr. Rosene expressed that they would not make any minute of it, would not put any thing on the minutes about it; that he had quite a discussion at that meeting; that he expressed himself so far as he was concerned to the effect that Mr. Rosene had no authority to make that subscription and that the company would not sanction it; that he expressed himself that Mr. Rosene had no authority to make that subscription and he, as a trustee, opposed its standing; that as far as he remembered, didn't know the exact wording, they all expressed themselves in the same manner; supposed that the opinion expressed by the different trustees or resolution that might be offered, was what Rosene did not want them to put on the record;

That Rosene reported that he had already paid the \$50,000.

(Witness asked: And after the trustees present had expressed themselves that they would not sanction this subscription, didn't Rosene want the board then to take at least to the \$50,000 which had already been paid, and was not that the matter that was left open without any action, and about which witness expected there would be some action taken in the future.)

That he didn't know hardly how to answer that, because what his opinion was might not harmonize with the rest of them.

That he remembered of expressing himself by saying that, according to Rosene's story, it was a good thing for them to have and that they might stretch a point and keep this \$50,000 of stock; that as far as he remembered, no other trustee expressed any agreement with that statement;

That at the meeting in September 5, 1906, at which the resolution was passed, authorizing the president of defendant to subscribe for \$125,000 to plaintiff, there was discussion between the members of the board, the substance of which was that they still felt that they had no business to take the stock, and another argument came up that inasmuch as they had paid in \$125,000 that it might be better to take it than to try to get our money back; thought that it was reported at that meeting that the \$125,000 had already been paid, did not remember by whom; had knowledge of these things probably a week or two before the meeting, in September; should say he got his information from Mr. Trenholme; at time resolution was passed in September 1906 knew it off-hand, by hearsay, that the plaintiff had been organized for the purpose of buying mining claims from Mr. Rosene; did not get the hearsay information in reference to the mining claims prior to September 1906;

That in September 1906 at time resolution was offered by him, did not know as to whom they had bought them from or who owned them.

Witness excused.

A. H. KELLOGG, recalled as a witness for plaintiff, testified:

That since adjournment he had made an examination of the books of the plaintiff, with respect to the issuance of \$750,000 shares of common stock; that the evidence introduced in this case, as shown by the books (transfer books of plaintiff) was to the effect that there was 499,989 shares of that common stock issued in one certificate on April 2, 1906, to A. A. Housman & Company, which was correct; that as shown by his investigation, certificate number 101, series G, for 160,099 shares of common stock in the name of A. A. Housman & Co. was the balance of the common stock left after the difference between that and the 499 thousand shares was issued by A. A. Housman & Company to various parties; that his list of stockholders submitted to the January 1912 meeting of board (plaintiff) showed 399,890 shares of preferred stock outstanding; that if one share of common stock was issued for one share of preferred stock, or allowing one share of preferred stock to one share of common stock issued, there would be left from the 750,000 of the original common issue, after deducting the 250,000 that went to Rosene, 160,099 shares; which was then in the possession of the plaintiff.

Cross examination.

He thought that there was 250,000 shares of common stock issued to Rosene in four different amounts; they were issued to Rosene; some of them may have been transferred back and forth, could not say; did not know; did not know where those certificates are; could not say that they were in the hands of A. A. Housman & Co.; could not say who has been issuing proxies to vote them at the various meetings—would have to look at the books, could not recall, there had been several meetings; would look that up.

Witness excused.

T. A. DAVIES, recalled as witness for plaintiff, testified:

That he was president of plaintiff since January 1910; that he had on hand in the plaintiff, the common shares of stock in the name of A. A. Housman, as testified by Mr. Kellogg, in the sum of 160,099 shares;

That there had been, during his incumbency of the office of

president, no repudiation or notice of repudiation on the part of defendant of this subscription.

Cross Examination.

None, during his incumbency.

That he had received the original of which paper marked Defendants' Exhibit No. 2, was the carbon copy.

(Paper received in evidence marked Defendants' Exhibit No. 2, and read to court and jury).

When he said his company had never got any notice of repudiation since he became president, he had not overlooked that letter (Defendants' Ex. No. 2). Did not regard that as notice of repudiation; he came in in 1910 as President; very soon thereafter his company brought an action similar to this to recover on this same alleged subscription; think the defendant in that case in 1910 denied any liability, but am not sure; they must have denied it, we started in on the trial; his company took a nonsuit after going partly through the testimony, and then he started these proceedings to bring a new suit; said he did not regard that letter (Defendants' Exhibit No. 2) as notice of repudiation; that there had never been any notification of a repudiation of the Rosene subscription since he became president in January 1910; that the defendant never paid that assessment or those two assessments;

That as far as he knew there was but one Rosene subscription on behalf of defendant in plaintiff company.

Defendant admits it hasn't paid anything on the assessments.

Witness excused.

E. J. MATHEWS, recalled on behalf of plaintiff, testified:

Was president of plaintiff from about July 1908, until some time in January 1910; during his incumbency in that office never received any notice of repudiation of this subscription in suit from defendant.

Cross examination.

Never considered that defendant had repudiated it before he had any connection with plaintiff; knew that defendant claimed they had repudiated it.

Witness excused.

A. H. KELLOGG, recalled on behalf of plaintiff, testified:

He was custodian of plaintiff's record since he was secretary; elected Secretary in January 1910; during his incumbency in of-

office of Secretary did not know of more than one subscription to the plaintiff's capital stock by defendant, the one in suit.

(Witness shown Exhibit E-2 attached to New York deposition of Edwin A. Pierce.)

That is the subscription he had reference to; as being the only one by defendant.

Cross Examination.

Was elected Secretary in January 1910. Records and everything (of plaintiff) were sent out here prior to that.

Witness excused.

CHARLES A. McMASTER, recalled as a witness for plaintiff, testified:

That he was requested to bring with him the record on the minute books of defendant showing the details of assets of defendant appearing on the balance sheet of April 1, 1907, which have been appraised and the values adjusted under the authority of the trustees and that he had that record; that it appeared in the minutes of the annual meeting of the stockholders held on 27th April 1908; details of assets of defendant appearing on balance sheet April 1, 1907, which had been re-appraised and values adjusted under authority of the trustees; that he found the investment of the plaintiff there; defendant's interest in the plaintiff; value, as of April 1, 1907, \$125,000; value, as of December 31, 1907, \$62,500; the difference between those two appraised values, entered there as \$62,500 charged to surplus, half of it charged to surplus, but the trustees appraised it on April 1, 1907, at full value;

(Witness reading record:)

"Detailed assets Northwestern Commercial Company, appearing on balance sheet April 1, 1907, which had been reappraised and values adjusted under authority of the trustees;" re-appraised, valued December 31, 1907.

That minutes of regular meeting of Executive Committee (of defendant) 18th of September 1907, had no reference to John Rosene, to action taken by the Executive committee upon (defendant's) president, nothing in those minutes touch upon that matter, on that date.

Cross Examination.

That the annual statements which he had referred to, were made up by compilation of assets and liabilities, and balance made; could not say off-hand without examining the books that those statements in books of defendant anywhere showed any lia-

bilities on an unpaid subscription to plaintiff; that as to how long it would take him to ascertain and answer whether in those statements which have been testified about, was contained or purported to contain a full statement of all the assets and all the liabilities, there is shown any liabilities or unpaid stock subscription to plaintiff owing by defendant, that he could look through the records and answer that question possibly by the time you (court) reconvened.

(Witness excused.)

Plaintiff thereupon offered in evidence the records and minutes of the special meeting of the board of directors of plaintiff held on April 19, 1907, at which a majority of the board were present, and at which the following proceedings were had, among others, the matter of the appointment of an executive committee as provided by the by-laws, as follows:

“Resolved, that the board of directors designate three of their number to constitute an Executive Committee who shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, including the power to authorize the seal of the corporation to be affixed to all papers which may require it; which said committee shall regularly report at each meeting of the board of directors; all matters and things theretofore done or performed by it respecting the business and affairs of the corporation.

The following directors were unanimously designated as members of the said Executive Committee: H. C. Davis, A. A. Housman and Caleb Whitehead.

On motion of Mr. Davis, seconded by Mr. Housman, it was unanimously,

Resolved, to abolish the office of managing director of the company and that said Mr. John Rosene be relieved of his powers and duties as such managing director to take effect May 1, 1907, and that Mr. Rosene be notified to that effect and be requested to make a full and complete report of all matters and things done and performed by him up to the date of termination of his office.”

The plaintiff thereupon tendered to defendant in open court certificate of preferred stock and certificate of common stock of plaintiff's capital stock, share for share, for the unpaid part of defendant's subscription and the same were lodged and filed with the Clerk of the Court.

Thereupon it was agreed by counsel for the respective parties that all the by-laws of plaintiff and the original and supplemental

agreements between plaintiff and John Rosene and all proceedings had since the organization of plaintiff and all minutes to which reference was made are in evidence.

Thereupon it was agreed by counsel for the respective parties, that all the exhibits attached to the depositions read in evidence, and offered in evidence, subject to objections as made by defendant.

Thereupon the deposition of witnesses for plaintiff as read in evidence, were offered by plaintiff, and received in evidence subject to the objection interposed by defendant at the time the depositions were made.

Thereupon, plaintiff offered in evidence the written stipulation of the parties consenting to the opening and publishing of depositions and waiving transposition of technical title of commissioners before whom the same taken.

Whereupon plaintiff rested.

Thereupon the defendant challenged the sufficiency of the evidence of the plaintiff and moved for a non-suit on the ground that the evidence introduced on behalf of plaintiff was not sufficient to warrant a verdict against defendant.

Ruling upon the challenge and upon the motion for a non-suit reserved by the court.

DEFENDANT'S CASE. Thereupon defendant called

JOHN J. HARTMAN, a witness for defendant, without prejudice to its challenge and motion for a non-suit, plaintiff consenting, who being sworn testified as follows:

That he resides and had resided in Seattle a little over twenty year; his business, Attorney, practicing in Seattle all the time had lived in the state, twenty-five years; that he was attorney for defendant in 1906, and one of the attorneys in 1907; was not at all his custom, as attorney for the defendant, to attend the meetings of the board of trustees, unless requested to be present; attended occasionally when requested; attended the meeting of the board of trustees some time in April, 1906, when the question of the subscription made by Mr. Rosene on behalf of defendant to the capital stock of plaintiff was under discussion; that he thought he was requested to be present by Mr. Treat, one of the trustees, as he then recalled.

That there were present at the meeting: Mr. Rosene, Mr. Trenholme, Mr. Thomsen, Mr. Treat and Mr. Greenough, Mr. Trimble, Captain Jarvis and in fact all of the trustees, he thought, except Mr. Hogan and Mr. George Williams; didn't know that he mentioned them all but he thought they were all there except those two.

Mr. Jarvis and Mr. Trimble and Mr. Greenough are dead; the survivors were Mr. Rosene, Mr. Thomsen, Mr. Treat and Mr. Trenholme, and Mr. Hogan whom he didn't think he had seen, but he (Hogan) never met with the board that witness knew of; he was an eastern man, a New York man; didn't think he ever met with the board;

That the principal matter for consideration, at that meeting, was acts of Mr. Rosene, president of defendant, in subscribing for shares of stock of the par value of \$250,000, he thought, in plaintiff, Northwestern Development Company, now known as Maine Northwestern Development Company and to take action as to whether that would be ratified or not by the board; there was some other matters, but that was the principal thing that was under consideration for which that meeting was called, Mr. Rosene just having returned by way of San Francisco from New York and the east.

That he was asked to be present to prepare a resolution or motion which probably would be passed as indicated; the discussion, he thought, started by Mr. Treat who was at least one of the aggressive members of the board on that matter; the question was discussed back and forth; Mr. Rosene insisted that it was a good investment and that the company ought to take the shares of stock, while all the members—not all possibly to start with but finally—were opposed to taking the shares of stock or having the subscription, and after a considerable discussion, a resolution was passed, on motion, declining to take the subscription or stand for the subscription as made by Mr. Rosene and repudiating the acts that he had attempted in the subscription which he had made; a memorandum of the affairs was taken by witness and, he supposed too, by Mr. Trenholme; he had expected to prepare the record in proper form with due reference to the facts as they existed; and then Mr. Rosene pleaded with the board to not make a record of the matter in the record books because, he said, that even if the board did not think the property valuable or the prospects valuable or the investment valuable, there was plenty of people who did, and he would have the Company entirely relieved from what he had done and others would take the entire subscription; would return the \$50,000 to the Treasurer which he had paid and that the Company would not have any obligation out, and if a record was made and the matter was talked about it would lessen his chance of correcting the situation and relieving him from much embarrassment because he would make good by having others take the stock which had been set aside under that arrangement. That witness was interrogated as to whether it was necessary in order to make it binding, to record it on the books, and he notified—he made a memorandum—he made notes at the time of the affair and as it was determined not to make any record in the book he threw those away at that meeting and he didn't think Mr. Trenholme was taking notes because it was wit-

ness' place to do that and he usually did when they were at such meetings—and it was not kept—so the matter is purely oral so far as it finally developed; that he was interrogated by members of the board as to whether the fact that the action which they had taken was not put down on the record would be binding and would hold good, and he told them that the record in the book was only a matter of preserving what was done; it was what was done that bound and counted, and they had acted and that made it binding and final providing they would give information to the members of the plaintiff and Mr. Rosene, the chairman, plaintiff's board, was there;

Witness thought, he, Rosene, carried his capacity of chairman of plaintiff's board with him; that he was acting in his double capacity there; witness knew so.

That Rosene was chairman of the board of plaintiff at that time and he talked for both parties as he would have been an honorable man and would do.

That Mr. Rosene put the motion that was made; there was no dissenting vote unless it would have been Mr. Rosene; he, Rosene, would oppose it but he did not vote; that there was no dissenting vote as witness recalled it; in fact the board were unanimous on that, and Mr. Rosene was consenting; he wanted to get a way to get out and save himself and not embarrass the defendant.

Witness had no personal notice or knowledge of any notice that was given to the officers of plaintiff of that action more than his suggestion or suggestion to the officers of defendant to notify them; only knew from hearsay otherwise so that would not be the best evidence; he instructed them to notify in some way the officers.

Witness thought he was present at the meeting of the board (defendant's) on September 5, 1906; that was when they finally decided to take, well, witness asked to see the minutes because he could not recall it from memory, if that was, what was done, he could tell.

(Witness shown minute book and his attention called to minutes of meeting of defendant's board of trustees on September 5.)

That he was present at that time; he thought he drew that resolution; there was discussion in the board at that time; Mr. Rosene had not succeeded, from witness' knowledge of the account book of defendant had by looking at them and talking with the bookkeeper—witness did not make any entries but got it from the cashier in the office, and he knew the general accounts and the action taken by the board and what they found and what they re-

ported on—witness was not a member of the board—but what was done—.

That the \$50,000 that was paid in the first instance and which was to be returned by Mr. Rosene under the suggestions and talk in the April meeting, had not been, and more money had been paid to plaintiff: witness thought it was on account of freight bills and goods sold up at Nome and things like that;

Witness knew from the books and from the statements of officers how that was paid;

That it was stated at the meeting by the directors who were there, including Mr. Trenholme, who had general supervision of all the accounts at all times, that, in addition to the \$50,000, \$75,000 or thereabouts more, as he recalled, had been added, had been taken out of defendant's treasury and paid to plaintiff and that they did not see their way clear to get that money back and they had better settle it by taking shares of stock to the amount of \$125,000, as that would be a plan which would settle the whole thing and make everybody agreeable in both companies to settle it that way. That was the general plan on which they proceeded and then a resolution was passed to take those shares and pay for them—the payment having already been made as stated.

Witness was present at the meeting of (defendant's) board April 10, 1907, that is the one that refers to this, and drew that resolution, drafted a formal notice of the action taken by the board.

(Witness shown letter marked defendant's Exhibit No. 3.)

That is the letter which he wrote or the action which he took in pursuance to the requirements in the resolution of the meeting of April 10, 1907, where he was directed as attorney for the company to prepare certain information and data; it was delivered to Mr. Rosene on that day, or possibly the day following, should say on that day; witness did not see him mail a letter; did see him talk with the president of the plaintiff about the matter.

Mr. Henry C. Davis of New York was president of plaintiff at that time; a partner of the firm of A. A. Housman & Co. Witness thought he saw Mr. Trenholme, secretary of defendant, talking with Mr. Davis, president of plaintiff, with respect to this notice, at different times when he was here in the summer of 1906, and it was witness' recollection, also in the spring and winter of 1907, he (Davis) was around here quite a good deal, for quite a good while; was not sure but what he (Davis) went to Alaska; didn't know about that.

That Mr. Davis, president of plaintiff, was in Seattle within a very short time after the action of the board of defendant in April,

1906, would say within a week or so if not when the action was taken; witness did not have any conversation with him to ascertain whether he had knowledge of the action of the board in repudiating that assessment.

Cross Examination.

Had been acting for defendant as its counsel when he attended this meeting of its board in April, 1906, since its organization in 1899, seven years; attended this meeting in April, 1906, he thought, at Mr. Treat's request, as he stated before; Witness was at the meeting during its entire sitting; was there during the whole period, during the entire sitting; at that time he had a few shares in the defendant; ten shares, he thought; had never been a trustee; object of his being present, as he stated, on request of Mr. Treat, that important action would be taken over some things done, and they wanted him (witness) to draw the resolution of the action which they would take; cannot say what was in his (Mr. Treat's) mind; he apprehended that he (Treat) had discussed the matter with other members of the board, because it was getting pretty warm about this action taken before the meeting—witness apprehended so—he was guessing; did not know what was in his (Treat's) mind.

Said he didn't know that Mr. Treat could know or could have known what would be the action of the board; he (Treat) probably could anticipate, as he evidently had been talking this matter over before they came in session;

Witness thought this matter was known to Mr. Treat that morning, probably, of the meeting; didn't know, couldn't tell. Counsel was asking him for an answer and he was giving it to him as best he could; he would tell counsel the truth.

Didn't think Mr. Treat was Vice President; It was witness' habit to meet the board at the request of any trustee that asked him to come; not to bring a resolution with him, written out or a form of motion written out.

Had never advised this board of the necessity for the protection of its stockholders the necessity of making permanent record of their transactions as a board; didn't think that question was ever asked him before this meeting came up; didn't say that Mr. Trenholme did not make any memorandum in writing during this meeting, didn't mean that; if he did he wanted to correct himself; said he didn't think he (Trenholme) made a memorandum of this resolution because he (Trenholme) knew witness was drawing that up, but he (Trenholme) was making his memoranda as he always did;

Didn't know he (Trenholme) did not make any memorandum of the resolution; because witness did not sit by him; witness was

in another part of the room; witness said he didn't know, saw him (Trenholme) have papers before him and appeared to be writing at times but what he made—what memoranda he made witness didn't know because he did not sit by him and could not see from where witness sat.

Witness took notes of this particular matter—thought there were other matters transpiring at the meeting at that time; took enough notes so as to draw a resolution; did not draw the resolution, as he stated, as they decided not to make any record of it, did not go any further.

Did not, upon his own motion or invitation decide not to put his notes into form of a formal resolution—it was the board that decided they would not put it on the books, provided that the matter would stand, and they did not put it on the books;

That the board was unanimous in their conclusion that they did not need to put the matter on the record in order to have it binding; that unanimity was expressed, upon witness taking the responsibility, expressed by the board, by the common consent of each one talking about it; did not want the jury to understand now that it was the individual talk of each trustee and that from that individual talk he drew the conclusion that the board were unanimous; that the fact was the board were unanimous; by unanimous consent they agreed to that, collectively, talk all around; possibly by talking all around that was the way they agreed to it; that was a legal conclusion; that he would tell counsel what occurred, was trying to tell counsel what occurred. That he said to counsel that he took notes of what should be contained in this resolution and after their deciding not to have it written out; he didn't retain them.

After they decided not to have them written out, he threw them away, that was what he stated and he affirmed it again. That there was a difference between preserving a memorandum of transactions in some written form and the spreading of that memorandum upon the minute books of the corporation, witness recognized that distinction, one is written down and the other you have to remember. That he understood that the memorandum could be preserved without spreading it upon the minutes. That possibly the determination of the board not to put it on the minutes, had no reference to the preservation of the memorandum; possibly he ought not to destroy it; that is a legal conclusion and therefore he could not tell counsel, was not drawing legal conclusion. That he said a motion was regularly put by the president of this board presiding at that meeting repudiating this subscription, the form of which in effect was, as nearly as he could recall that in view of the fact that the president, as the board viewed it, had acted beyond his

powers, the attempted subscription to the shares of stock of plaintiff would be repudiated and not binding upon the defendant, or words to that effect; may have been stated more briefly or more fully, he could not say exactly, did not remember the words verbatim; thought it was Mr. Treat who moved the adoption of that motion; his memory did not serve him which one seconded it; and therefore after a good deal of discussion, the President put the motion and the trustees voted on it; that he made a little memorandum of it there, as he stated, and then when he left the room or some time he just threw it away, he did not keep it.

(Witness was asked if he did not think it was advisable to keep a permanent record of the transactions of the board upon an important matter involving \$125,000, particularly after the board had determined not to spread it on the minutes.)

Answering that now, it did not impress him of so much importance because of his belief that Mr. Rosene would be able to get the money back and relieve the company entirely from what he had attempted to do; he believed that he (Rosene) would do it and it seemed like a mere formality and his (Rosene's) explanation was made and when he (Rosene) found they did not want to go on, he (Rosene) would have it placed in another way entirely.

Believed that, at the September meeting of defendant's board, Mr. Trenholme was present; Mr. Trenholme had supervision over the accounts of the defendant at those times;

Had not heard his (Trenholme's) testimony that morning with reference to that, was not here (in court) when he (Trenholme) testified; didn't hear his testimony, said he was not here; Didn't know that he (Trenholme) reported at this meeting in witness' presence; it might have been the treasurer, Mr. Treat, as witness remembered—or they had something pending—witness knew there was a lot of freight involved at one time there—that he had had the impression that they had a large freight item and stores sold at Nome; because the defendant ran a store at Nome—the defendant, as he recalled, sold merchandise to plaintiff that was operating up in Alaska and they were not paid for it over the counter and this became a matter of debit and credit and the plaintiff had obtained from the defendant a considerable amount of value in the way of freight on goods that were sent up by itself and merchandise they bought and other things, as he recalled the circumstances now.

That, he believed, would put them in debt to the defendant, if they bought and did not pay cash over the counter.

(Witness was asked did he know of his own knowledge that the credit for any of those sums of money on this sub-

scription was made in order to offset anything plaintiff might have owed for the purchase of stores at Nome.)

No he did not know how the matter was adjusted, that was a matter for the auditor; didn't want to just admit it (that he didn't know anything about it at all) altogether just for counsel's sake. Thought he knew something about it. Did not know that defendant paid plaintiff a balance in a check of \$32,000 in October. Had heard the testimony of Mr. Ford, heard Mr. Ford so testify. Witness denied that he said that in this September meeting 1906, Mr. Trenholme advanced the proposition at the board or before the board that in as much as there was \$125,000 paid at that time upon the subscription and they did not see any way to get it back they ought to let it go and let it stand, did not say that. That he had said there had been obtained either in credits or advances including the \$50,000 paid by Mr. Rosene in the first instance, by the plaintiff something like \$125,000 and he thought that Mr. Trenholme made the statement, might be mistaken as to the officer that made it—he had said that before and he stuck to it; that was his recollection, Mr. Trenholme gave the information; Witness hadn't on direct examination, also advanced the fact that Mr. Trenholme had stated that they did not see any way to get the money back and they had better settle; didn't think that was his testimony exactly; thought he had said there was a difference and there was a dispute. Didn't know of his own knowledge whether there had been \$125,000, paid on or before September 5, 1906, upon this subscription, because he did not pay it.

That the general knowledge he had of the books was all sufficient, as he had faith in the statements made by the officers of the company to make him think that was the fact.

That all he knew was what they told him—that he didn't keep the books.

Was under the impression now, his recollection of it was now that those accounts were brought before the board at that or—he thought at that time—as he remembered. That Mr. McLaren, if he recalled, was the Cashier and worked on the books. Witness thought he was the one who came into the meeting, as counsel brought it up further, witness thought Mr. McLaren finally came in to verify some of those things and, he thought, went over them with the books; as he stated a while ago, he might be mistaken about the time that he was getting the information as to when the whole \$125,000 was paid; he had said before it might have been in 1907, but he thought it was during the fall of 1906; it might have been at the April meeting of 1907 when this thing was gone over. That he drew the resolution which he said authorized the subscrip-

tion for \$125,000 which was adopted at the meeting of the defendant's trustees in September, 1906; he had so stated.

(Witness was asked upon what he based his resolution so far as the amount was concerned, and why he did not draw it for \$75,000 at that time, which was the amount which had been paid up to that time.)

That he did not know that was the amount; he had only counsel for plaintiff's statement for it and that was worth the same as his own; his understanding, as he had told counsel, was that that was the amount of the incurred or the incurring liability—obligation—and he thought it was \$75,000—for matters advanced, as he stated before, and the \$50,000 that Mr. Rosene paid; but the books would show that but he didn't give that as the fact, only his recollection, as counsel was, that he would put it the other way, counsel wanted the fact as far as he recollected it and he would put it that way; he had given the fact so far as he recollected it.

That he thought, probably, he also prepared the resolution which was adopted at the same meeting September 5, 1906, by defendant's board of trustees directing the stock held by defendant in plaintiff should be disposed of down to \$50,000;

(Witness was asked: Why, so far as he could learn from the discussion that took place, why they desired to authorize the subscription for \$125,000 when at that time there was only \$75,000 which had been paid, and then on the subscription for \$125,000, ordered a resolution down to \$50,000.)

That the whole thing was a disagreeable mix-up and it had caused ill feeling; that he was not drawing conclusions, was answering facts; that the board looked on this subscription they had gotten into a disagreeable frame of mind and they wanted finally to "give and take" and get out of it the best way they could. The members of the board felt that the President had not treated them right and he (the president) felt that he had and there it went.

(The following question being there put to witness:

"I know, but Mr. Hartman, their ledger shows that this Company had at that time paid \$75,000; now if they were anxious to dispose of their holdings in plaintiff down to \$50,000, why not reduce it from 75 to 50 instead of lifting it up to 125 and then bringing it down to 50."

Witness answered:)

"Ask the board, I don't know."

That he was at that meeting; that he was telling counsel what they discussed in his presence; what transpired at previous meet-

ings he didn't know; that he had said at what previous meetings they had reached their conclusions he didn't know; they could have acted and not had a record; they had many conferences that he knew of on things, many, many of them.

(Witness was asked from what he knew of the action that transpired at that meeting and the discussion that was had between the trustees, he did not know from their statements why they authorized the subscription for \$125,000 with only \$75,000 then paid upon the one that was reported and then reduced it to 50.)

That he would answer it again, he had three times. It was a disagreeable matter for them; that was the way they talked about it and they wanted to get out and be relieved of the situation and the discussion and the embarrassment and the entanglement, and with as little loss as possible.

That he presumed that resolution expressed in toto the desire of the board with respect to the subscription of defendant to plaintiff's stock, he couldn't say—that he embodied what, as a lawyer, he thought carried out the transactions as it was transacted that day before the board, as he understood the action; that he put in every element that had any bearing on the question so far as he had remembered it.

That he believed that that (authorizing the president to subscribe to the plaintiff's preferred stock in the sum of \$125,000) was what it said—the resolution spoke for itself; if he had it before him he could give counsel an opinion, if counsel wanted it. Didn't think his opinion was worth anything though, or that, it was the fact counsel wanted.

(Counsel then read to witness from minutes of defendant's board meeting of September 5, 1906, as follows:

“The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed.)

That he presumed that referred to the subscription he, Rosene, had reported in the April meeting.

(Counsel, continuing reading:

“And Mr. Thomsen introduced the following resolution”).

That counsel was badly mixed (in asking witness that he remembers it was Mr. Thomsen now instead of Mr. Treat); he had

said Mr. Treat introduced the resolution that was not recorded, witness had never discussed that resolution with counsel.

(Counsel, continuing reading:

“The question of Mr. Rosene’s subscription to the stock of the Northwestern Development Company was fully discussed and Mr. Thomsen introduced the following resolution: Resolved that the president be authorized to subscribe to the stock of the Northwestern Development Company for this company in the sum of \$125,000.”

“Mr. Thompson moved the adoption of the above resolution and the same being seconded by Mr. A. J. Trimble, the same was put to a vote and unanimously carried.”)

That he thought he prepared that resolution; as a lawyer for the board, at their request and it was adopted, to settle that tangle that they go into, understanding that that wiped the slate as between the companies; that was what the fellows said and he heard; that was not (witness’) conclusion — the understanding was right then to the effect that this would wipe the slate, if counsel might pardon that expression, between the parties and settle the differences;

That he did not say a minute ago that there was not any conditions attached to the subscription. That what was said (at that board meeting) by the different members was that this was and had been an embarrassing matter, as witness stated before; that there was some feeling and that if they made a subscription for \$125,000, the differences then going on between the two companies would be settled on that amount and there would be no further difficulty between the parties. That, to use the expression, that would wipe the slate; that in that way the matter could be ended which was then disturbing the officers of the two corporations and the two corporations and it was sort of a compromise settlement or arrangement finally in the interest of peace and harmony—that was as he remembered it; that Mr. Rosene was there and presided; that, as the examination (of witness) has gone on, he would say that probably this resolution was a little too brief to express all that was contemplated, understood or done when the board acted on it;

Witness did not understand, as a lawyer, that in the resolution of the board, all their previous understandings are merged in that action; that he didn’t understand this as counsel stated, that he drew the resolution and probably as it then came up and as he understood what counsel said, he did not put in all he ought to have put in, and they adopted it the way he drew it, thinking that it did cover it;

That he had stated three or four times he thought there was other things that they did, bearing upon this resolution; giving the reasons for it and why it was done; that he thought the word "compromise" ought to have been in there; it would have been better, but it was not; it was a compromise arrangement believed to be for the interests of all the parties and was so stated and recorded and acted upon in that way when they voted on this resolution.

(Witness asked by whom it was so stated, answered:)

That he thought they all talked; they did as far as he recalled; that Rosene talked about it, he was pleading for harmony and to get on a basis where there would be no more ill feeling and there had been some considerable.

Didn't believe that Rosene ever cast a vote because usually when an action was taken, there had been considerable discussion and if there was likely to be differences on the final end, as a rule everybody voted for it, and if they did not have a full vote, action would not be taken. They were men who were not afraid to express their opinion before they voted.

That he thought if he had anticipated then what he knew now he would have elaborated that into perhaps a page, because he didn't think of any lawsuit, he didn't usually—he would have given some preambles and whereases.

That the meetings of the board were held usually in Mr. Rosene's office, which was in the front corner of the Lowman Building, they having a floor and in the northeast corner of the room was Rosene's roll top desk and immediately in front of and to the west a little running off that, was a table, say eight feet long, and they would have chairs on the further or westerly side of that table, round the end of it and toward Mr. Rosene; he was usually at his desk, and if they had a full board they could not all sit in that place there; sometimes some of them would be off on a big sofa in the south end of his room;

That he thought Mr. Rosene actually presided at that meeting. Didn't remember anything to contrary. Witness had said that Rosene was present at the April meeting in the capacity as chairman of the board of plaintiff; That he (Rosene) so announced himself; in fact witness thought that was the first he knew that he (Rosene) had this position; he (Rosene) told them about it and he was there he (Rosene) said he represented both companies' business and he talked about it and told us he would correct those things and he had some power and authority; Witness didn't think he knew what his (Rosene's) official connection was; knew he (Rosene) was connected with the Company.

Witness' recollection was that he (Rosene) did try to impress on all of them and witness got the impression that he was likewise—could act by virtue of his position as chairman of the board of directors of plaintiff; that was the impression witness got from what he (Rosene) said and witness thought that was true. Counsel would have to ask him (Rosene) when he came on the stand; he (Rosene) could tell counsel more particularly;

What might have been in Rosene's mind would not cut any figure at all, but what he actually stated and if witness was there he heard it.

(Witness was asked, did Rosene state he was there in his official capacity representing plaintiff; answered.)

That he couldn't make it any more clear than he had said heretofore two or three times.

Witness did not say that he meant in his (Rosene's) person and nature, his outward garments, he created an individual that was in fact the president of one company and the chairman of the other, and counsel knew that he didn't. Counsel knew that witness said Rosene was there—he was there—he was chairman of the board and witness thought he Rosene, said he could act for that concern and would act or something to that effect and he would straighten all this up—could represent both of them now and they would listen to him or something to that effect.

Witness thought he was Rosene's attorney then, his personal attorney; that Rosene did not have any private business that witness could recall—it was all company business.

Witness advised him from time to time if he needed advice—witness thought witness had a little case that somebody sued him, no that was before this time; witness didn't remember that Rosene had any private matters but if he did he probably would advise with witness; witness had his confidence.

Thereupon counsel for plaintiff desired to correct an error that he made at the time he rested, that no prejudice had been done to defendant; he desired to call for the notices of assessment that were in the order of the court to produce. Counsel for defendant stated they would produce them at the next hearing.

Thereupon counsel for plaintiff requested leave and leave was granted by the court to make the following correction:

To correct a date in the sixth paragraph of further reply to fifth affirmative defense, from year 1910 to 1907;

To correct the figures in paragraph seven of amended complaint and in paragraph six of the reply from 500,000 to 499,-

989, and same correction in paragraph four of reply to fifth affirmative defense of answer. To further amend plaintiff's reply by admitting the allegations of defendant's amended answer that the alleged subscription referred to in the amended complaint was delivered to the plaintiff.

Witness HARTMAN desiring to correct his testimony stated as follows:

"When I stated that Mr. Trenholme had general supervision of the accounts, I should have stated M. M. Perl, the auditor. The two men would both be before the board, and it had been a good long time and witness got a confusion of the two different men and the positions they held. Perl was the auditor and general bookkeeper."

Witness excused."

Thereupon defendant offered in evidence the by-laws of defendant contained in the book which plaintiff had already introduced in evidence as the minutes of defendant.

Thereupon plaintiff, agreeable to time granted to it for that purpose, tendered in court to defendant certificates of stock for 25,000 shares of the preferred stock of plaintiff issued in defendant's name, and 25,000 shares of common stock of plaintiff, issued in defendant's name, dated November 24, 1915, as the date of the issue, tendering them in proof of plaintiff's allegations in its amended complaint of its readiness, willingness and ability to comply with the subscription contract and as an offer to comply with the subscription contract upon payment of the money; that the certificate of the common stock is part of a number of shares which was included in certificate number G-101, issued in the name of A. A. Housman & Company for 160,099 shares, which was part of the original deposit; certificate G-101 having been cancelled and this issued in lieu thereof and the balance put in the balance certificate.

Certificate as tendered ordered filed in the cause by the court.

Thereupon defendant renewed its offer as evidence of the by-laws of the defendant, counsel for defendant stating that the by-laws were amended in 1907, but not in any particular referred to in 1906, at the time which defendant wanted these to have reference to; they were exactly as they appear on page 10 of this minute book; and particularly offered Article 3; also Section 6 of Article 7, also Article 9. All of which were received in evidence and read to the jury.

H. W. TREAT, called and sworn as a witness for defendant, testified:

That he resided in Seattle, had resided there 10 years; was in 1906 a stockholder of defendant; in March, April and May 1906 was a trustee of defendant.

The board of trustees of defendant did finally authorize Mr. Rosene, the president of that company, to subscribe for stock in the plaintiff company;

(Witness asked if prior to 5th September 1906, the defendant's board ever authorized Mr. Rosene to subscribe to any stock in plaintiff company, answered:)

That he should have to see the minute book before he could answer,

That the defendant's board of trustees, at any meeting attended by witness, did not authorize Mr. Rosene to subscribe for stock in plaintiff company, prior to the board meeting of September 5, 1906.

That witness attended the meeting of the board of trustees sometime in April 1906, after Mr. Rosene returned from New York, when the question of the subscription he had made to the stock of plaintiff company, came before the board.

That he remembered that Mr. Thomsen, and Mr. Trenholme and he thought Captain Jarvis were present at that meeting; that it was his recollection that Captain Jarvis was there; he would have to look and see; he remembered Mr. Thomsen and Mr. Trenholme was there and Mr. Rosene; he remembered that Mr. Hartman was present, he was there; knew how Mr. Hartman came to be there, at whose request; that witness asked him to go to the meeting;

That they learned that Mr. Rosene had organized a company in New York and that he had tried to connect them with it in some way, and their impression was that they did not want any interest in it, because they had all they could attend to and they prepared themselves to put themselves in a position to resist any connection of their company with the other one, as far as any investment was concerned; that was why witness happened to have Mr. Hartman down to put the matter in legal shape, where they would be outside of it.

That at that meeting they passed a resolution that they repudiated Mr. Rosene's subscription; didn't remember who introduced that resolution; witness might have; thought perhaps he did, was not sure, thought so though. That every body was in favor of

it and it was carried; Mr. Rosene then said that the stock had been over-subscribed in New York and it would be much easier for him, and it would keep him in better standing with his associates, if they did not take any action which would reflect upon the subscription, and begged them not to do it and assured them that he would let the people who had subscribed in the east take the stock in their stead, and asked them for that reason to leave it off their record and not to make any permanent record of it, and they consented to it, thought that would be the simplest way out of it, so that it was not put on the record.

That they talked it over with Mr. Hartman at the time and he said that would be perfectly all right.

That he would not tell when the next time was that the matter of that subscription came to the attention of the board without looking.

That September 5, was the next time that the question of that subscription came before the board;

(Witness' attention called to the minutes of that meeting, as follows:

“The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed and Mr. Thomsen introduced the following resolution: ‘Resolved, That the President be authorized to subscribe to the stock of the Northwestern Development Company for this company, in the sum of \$125,000.’ Mr. Thomsen moved the adoption of the above resolution and the same being seconded by A. J. Trimble, the same was put to vote and unanimously adopted.”

Farther down in the minutes:

“The following resolution was introduced by Mr. Thomsen and seconded by Mr. A. J. Trimble and unanimously adopted, namely,

“Whereas, it was necessary to provide funds to build or purchase additional steamers for the Company's use;

Resolved, That the President be instructed to sell or dispose of the stock held by this Company in the Northwestern Development Company down to \$50,000,” and witness testified:)

That he remembered those resolutions;

(Witness was then asked:

“State what took place before the board at the time when those resolutions were adopted.”

Counsel for plaintiff objected to the question on the ground of incompetency, objection overruled by the court, and an exception to the ruling of the court was taken by plaintiff and allowed by the court, whereupon the witness testified:)

That they had a general discussion and looked into the accounts of both companies and found the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that if they were to settle upon a \$125,000 sum it would merely square the account and make it satisfactory to both companies and start over again, as it were; so the transfers were made. There had been some transfers made in the books without coming up before them—he didn't think there was any cash paid for any of this stock; he thought it was merely a question of bookkeeper's transfers and journal entries; that he was the treasurer at that time; that there had not been any cash payments on this Rosene subscription that he knew of; he never knew how it was paid for. All of those things came up at that time. They found that there had been entries and cross-entries and credits and debits, and that by making it \$125,000 subscription they could nearly square the accounts, and it would seem to be the proper thing to do—a compromise arrangement—and that resolution was passed; that Mr. Perl, who kept the books had made those entries which witness spoke of on the books; that he thought Mr. Perl was dead, he didn't know, some one had said so here (at the trial) the other day; he didn't know it before.

Cross examination.

That it was his recollection that he offered the resolution in the April meeting; that Mr. Rosene did not vote—he was in the chair; he did not vote against it; he made no indication, so far as witness could recollect, of voting one way or the other; that he (Rosene) did not offer any protest against it until after it had passed, and then he made this plea to the board not to put it on record; that he (Rosene) put the motion; as chairman; that Mr. Trenholme was secretary of the company and, he imagined, secretary of the meeting;

That witness thought it was the custom for the secretary to make memorandums of the meeting and afterward write them down in the book and have them signed by himself and the president.

That he supposed Mr. Trenholme would make those memoranda but Mr. Hartman had drawn up the resolution because we wanted it in proper form; that Mr. Hartman had not written this resolution before he (Hartman) arrived there; while he (Hartman) was there, witness asked Hartman to prepare it in the proper form as he wanted to put the motion to repudiate that stock beyond any question; witness had said he wanted it put in shape so that there would be no question about it; he therefore directed it and Hartman wrote it; they had it in the proper shape in any case, because they were very much excited and afraid they were going to make a loss, and it was a large amount and they did not want to take any chances; that was the way he looked at it; as a matter of fact it was in definite, concrete form at the time it was offered; and was read to the board, as a board, before the vote was taken, so that they all might know definitely and concretely what they were voting on; that he didn't know what became of the resolution paper; he heard Mr. Hartman say on the stand he (Hartman) had destroyed it; witness never knew, he never paid any attention to it, he supposed Hartman kept his memorandum;

He didn't hear Mr. Hartman say on the witness stand that he (Hartman) drew that resolution in concrete form, witness knew that Hartman did because witness required him to do it;

After the motion was put and carried Mr. Rosene requested or begged the board to leave the matter off the minutes, not to make it a matter of record;

Rosene said: "If this goes into our minutes, or into our meeting, it might be misunderstood by the people down east and they might not think this is the good thing that I know it to be and you don't know it, and they want it and they are satisfied with it."

Witness didn't know how the people down east would know anything about their minutes; he thought it would make a little difference, whether the resolution was on a separate piece of paper among the files of the secretary's office or incorporated regularly in the minutes of the board, so far as the people down east were concerned; for instance plaintiff was bringing all these records into court today and reading this minute book and rereading it, that showed how easy it was for the regular record of the meeting to be known to the public.

(Witness was then asked: "Then that was the more reason it should go on the record—the honest records of the transaction—of the board," and answered;)

That he was not a lawyer.

(Witness was then asked: "You would not have to be a lawyer; that is a matter of business and good morals" and answered:)

All right. That witness thought he was the largest stockholder at the time, as a matter of fact.

That it was agreed to leave the matter of the resolution off the minutes; that was not by a vote, by common consent; the secretary or whoever was keeping the record there understood that it was not to go on the minutes; that he thought he read the resolution that had been prepared, not the chairman; that he could not recollect what became of it after it left his hands; he supposed he put it down on the table; they all sat around a table like that at those meetings; he was sure he didn't know what became of it; there was no motion made to leave it off the record;

That he said he was present in September 1906, at a meeting when a resolution authorizing the president to subscribe to \$125,000 shares of the preferred stock of this company was adopted; and the resolution authorizing the disposal of the stock held by defendant in plaintiff to reduce it to \$50,000;

That he did not say that the books were brought in and he made an examination of them; he said they talked over the amounts and that they called in the accountants and found that there had been credits for freight and for Nome stores and so on; he didn't think he examined the books personally.

(Witness was then asked: "You do not know anything about the actual amounts, do you, one way or the other," and answered:)

That he knew there was approximately \$125,000; that was what was told them at that time;

That you have to take the word of your bookkeeper, that was their bookkeepers or their accountants, what they told them, if you can't depend upon them he didn't know who you could depend on; Mr. Perl told them;

That his recollection was that there was altogether about that lump sum, \$125,000 one way and the other, as he recalled it, so that in their making that \$125,000 subscription it would practically square the accounts.

That he thought the debt was largely for freight.

(Witness was then asked: "Then there was freight pending at that time which would absorb this, and you forgave the

Development Company the freight, is that the idea—you forgave the plaintiff company the freight charge,” and answered:)

That he didn't know how to interpret that “forgave it the freight charge.”

That he did not consider it no longer a liability on the part of the plaintiff company; that charges were made one against the other; if they owed us \$125,000 for freight and other matters, and he thought there had been \$50,000 credited to them early in the arrangement, and then there was approximately, he thought, another \$75,000 due the company from them, for freight and supplies; so that as he understood it the two items then of \$50,000 which had been credited to them originally on the subscription and the \$75,000 which they owed for freight principally, would make up the \$125,000; he thought that was wiping out the freight; he thought that was crediting them instead of charging them—crediting them with the stock and charging them with the freight; he didn't know what entries were made; there were a great many entries and cross entries, he was not a bookkeeper and could not tell; he was treasurer, but he had his man in there; witness never had anything to do actually with it, he did not do it personally; he hired a man to do the work in there as treasurer; Mr. McLarin was their treasurer;

That the defendant, as he recalled, owned one concern which was operating stores, and another which was lightering freight from ship to shore at Nome and another which owned a line of steamers which carried the freight between here (Seattle) and Alaska; that he thought those concerns were independant corporations, owned and controlled by defendant; the Northwestern Fisheries Company and the Northwestern Steamship Company, and the North Coast Lighterage Company, as he recalled, and he didn't remember the name of the store company, there was four of them.

Would not know without looking whether it was the Northwestern Steamship Company that plaintiff owed this freight to, or the defendant.

The defendant and the Northwestern Steamship Company were having business as between each other constantly; one would advance so much money to the other and had a credit for it, and so on, and so undoubtedly he would think that the way it was probably arranged was that this freight was probably charged to the defendant, if the persons who got the benefit of the freight carrying, who were under the dominance of the defendant, did not settle within a certain time, then they charged it to the defendant and

the defendant had to do the collecting for that freight, bankers for them.

They, defendant, were the mother concern, the construction concern.

That the debt, if it was charged to the defendant was not due the steamship company. If the steamship company carried goods for the plaintiff at the instance of the defendant, and the plaintiff did not pay the freight, then the Northwestern Steamship Company could say "I will charge it to the Northwestern Commercial Company—I will charge it to you because you introduced the parties;" then the Northwestern Commercial Company would look to the other fellow to settle with him.

He could tell how the defendant could collect any money from the plaintiff for any freight carried by the steamship company, because they were responsible absolutely, the Northwestern Steamship Company had no business with the plaintiff and probably did not know them, they probably did not know them in a business way. They issued bills of lading to them for the freight but then somebody must be responsible for that freight, he would say so. If he was to introduce a man to you and tell you that his credit was good and to go and give him some money and after the ten or twenty days or sixty days the man did not settle with you, you would come to witness and you would say: "You told me, why, that man was all right, and I looked to you—I didn't look to the other man; I didn't know anything about him."

That he was not sure that it was true that the Steamship Company really did not know the plaintiff and it was the defendant that was standing sponsor for the plaintiff for the freight carried by the Steamship Company, but that would be the general way of it and he presumed that was the way it was done; he did not look it up to see;

That he was trying to give counsel the facts and if counsel would listen and not be quite so impertinent he would give them to counsel a good deal better.

That when he spoke of them (Steamship Company) not knowing plaintiff that might mean they did not know plaintiff in a financial way. They would not leave it to the discretion of the Northwestern Steamship Company, whether they would give a man credit for \$125,000 of freight, because, as a matter of fact, the defendant owned the Northwestern Steamship Company and they would not allow them to make any credit like that to any concern they liked.

That he thought that much credit was extended, he imagined that they carried it for them.

That he would bet a thousand dollars that they carried more freight than that for them;

(Witness was then asked: "Did you charge the freight in this ledger account against the plaintiff" and answered:)

He did not charge anything.

That, as treasurer he was not responsible for freight charges and all that sort of thing, he had nothing to do with it; didn't think he was—never felt that he was—he felt that the bookkeeper attended to all that; he was treasurer of the Company, they conserved the funds, and paid dividends every year and there was no trouble about that.

That he could not tell where the freight is charged; could not tell on that ledger account where the freight was charged, against that \$125,000 that is credited to the Company on their subscription, would not want to try because he was not an experienced bookkeeper.

Didn't think he was also treasurer of the Steamship Company, didn't recall who was.

That his impression was that the larger portion of that \$75,000 or of the allowance they were making in September to foot up to \$125,000 as an offset to the subscription, was freight.

That he supposed that the plaintiff sent up its own supplies, principally, but there were so many things in Alaska that the people found afterward that they needed over what they would send up themselves, that he thought they bought a good deal from the Nome store—he would say the most of it was for freight though.

(Witness then shown checks, Exhibit AA, and testified:)

That he recognized the names of J. D. Trenholme and John Rosene there; that he thought those were the signatures of Mr. Trenholme and Mr. Rosene, they appeared to be; that this first check was drawn by plaintiff on National Bank of Commerce at Seattle and payable to the Northwestern Steamship Company, and he imagined they all were.

That he recognized the endorsement of the checks by an officer of the Steamship Company, Mr. McLarin, he thought.

(Witness' attention called to each of the checks.)

That these seem to be endorsed by McLarin, which would indicate that the Steamship Company got the money on those checks,

in the ordinary course of business; that they are all stamped "paid" on their face; but that was probably in excess of this other amount, that was probably what they owed more than what the other amount called for.

(Witness was then asked: "You do not know anything about that," answered:)

That he would like to bet counsel on that.

(Thereupon plaintiff offered the 13 separate checks in evidence, checks drawn between June 14, 1906, and December 22, 1906, by plaintiff upon National Bank of Commerce payable to Northwestern Steamship Company, aggregating something like \$174,000, and they were admitted by the court and fastened together and marked Exhibit AA.)

(Witness was then shown expense bills on a form of Northwestern Steamship Company, a large number of them tabulated, and asked whether he recognized those as being the expense bills of the steamship company, and answered.)

That some of the other officers in the office would be much more competent to pass on that than he was.

That was the statement OK'd by M. M. Perl, the auditor of his company, apparently that was the usual way of doing it.

(Thereupon plaintiff, in connection with Exhibit AA, submitted for the convenience of court, counsel and jury, a tabulation of those checks, giving the date, number of check and amount, together with the date, footing up to \$174,963.)

(Thereupon defendant admitted that these items, covered by the checks, did not go to make up the \$125,000 which went to pay that stock, did not go into this account, Exhibit K.)

(Whereupon the cross examination of the witness was resumed and he testified:)

That he thought he recognized those, Exhibit BB, as the expense bills of the Steamship and the signature generally, that was in the due course of business, but he thought Mr. Trenholme should be asked about these, he, Trenholme, was the man who knew about these.

That witness recognized Mr. Perl's signature—they were the regular printed form;

That the expense bills are all signed by the officers of the steamship company, apparently they are all receipts; and the first

sheets are statements covering the expense bills which are attached to each statement, according to the shipment on the date of shipment and the vessel;

That there might have been more than one statement for a sailing;

That there was one that was not signed and that one was not, and here was another that was not and here was one that was not; here were a bunch that was not, but may be the draft covered that—he supposed the draft, though, would cover them—these were all marked “Prepaid M. M. Perl, Auditor”—that these are all apparently paid, including the one with the draft attached.

(Whereupon plaintiff offered in evidence the expense bills and receipts, as Exhibits BB, and the court thereupon reserved its ruling until further proceedings.)

Redirect examination.

That he thought Mr. Rosene had reported at their meeting in April that he had already paid \$50,000 on this subscription.

That at the September meeting it came out that there had been an additional payment of \$25,000 in July; didn't remember just when these facts came out as to dates, it was ten years ago and of course he had a recollection of the whole thing as it came along, but he did not recall the dates.

That the statement of account then was that including these amounts which had been paid \$50,000—and the other credits which they were to give at that time—taking the indebtedness of the defendant against the plaintiff at that time aggregated about \$125,000; as the business was going on all the time carrying freight as he recalled at that time and business was going on between the two companies at the time;

Did not know anything about whether the plaintiff made its clearances of its business through the defendant, its checks paid and so on; the other officers would have more knowledge of that. He didn't know.

(Witness was shown Exhibit K and asked what was the balance of the indebtedness from the plaintiff to the defendant, as shown by the last balance sheet made prior to September 5, 1906, and testified:)

Would it not be better to have one of the accountants figure them up and balance these up; there was no balance sheet there, was there?

Yes, it was balanced up August 31. It showed \$57,692.22; that it looked to him like the defendant's books when last balanced prior to September 5 showed the plaintiff to be indebted to the defendant in that sum, \$57,692.22.

That there had been \$50,000 paid by Mr. Rosene in April and \$25,000 subsequently, making \$75,000 on that stock that was already credited; and those payments together with this \$57,692.22 was what he understood was paying for this \$125,000 of stock which they authorized to be subscribed, that was the way he recalled it.

Witness excused.

J. D. TRENHOLME, recalled, as a witness for defendant, testified:

Name was J. D. Trenholme; resided at Seattle since fall of 1899, was connected with the defendant in 1906, had been connected with defendant since its organization in the winter, about January, 1900, as he remembered it; had been a trustee of that corporation and secretary, also a stockholder.

Never held any stock in plaintiff; never served as a director of plaintiff;

Didn't think he ever qualified as such.

Never gave anybody a proxy to represent him as a stockholder at any stockholders' meeting of that company;

As secretary had charge of the minutes of defendant corporation; those minutes were written up afterward, after the trustees were in session; kept just notes from which to make his entries; after his minutes would be written up, the notes were immediately destroyed, they were not kept at all; merely a memorandum from which he could write the minutes.

Would say that he attended all of the meetings of the board of trustees of that corporation between the middle of March and the 5th of September, 1906.

That the defendant at no time prior to September 5, 1906, ever authorized Mr. Rosene to subscribe for capital stock in the plaintiff on behalf of this defendant in any amount.

(Witness was then asked: Did the board of trustees at any time ratify any subscription made by Mr. Rosene to the capital stock of plaintiff outside of the subscription authorized at that meeting of September 5, 1906. To which plaintiff ob-

jected as incompetent and not the best evidence and calling for the conclusion of the witness;

Which objection was overruled by the court, to which ruling the plaintiff excepted and its exception was allowed; whereupon the witness answered:)

They did not.

That the first time he ever got any information from any source that Mr. Rosene had attempted to make the subscription to the capital stock of plaintiff on behalf of defendant was one morning when he was passing the Puget Sound National Bank, Mr. Furth called him in and showed him the prospectus of the plaintiff.

That was when Mr. Rosene was in New York, he had not returned for some time afterwards; that there was a meeting of the board of trustees called and held immediately after Rosene's return; it was called for the purpose of having an explanation from Mr. Rosene;

There were Mr. Treat, Mr. Thomsen, witness, Captain Jarvis and he thought Mr. A. J. Trimble, and Mr. Greenough, present at that meeting; of those trustees, Mr. Jarvis, Mr. Trimble and Mr. Greenough are dead; Mr. Hartman was present at that meeting; Hartman was attorney for the company;

That they were very much excited over the fact that Mr. Rosene had made a subscription without consulting his trustees and immediately upon his coming home the trustees were called together for the purpose of having him (Rosene) make this explanation and he explained the organization of the plaintiff, stating that it was, he thought, a good thing and good business for the defendant to be identified with; all of the trustees disagreed with him and a resolution was introduced disaffirming his action.

Witness did not know who introduced that resolution; he had forgotten but it was introduced; Mr. Rosene made the statement that if we did not want that investment that he could readily take and sell the amount that he had subscribed for their company and he asked that we make no official record of that meeting for the reason that it might handicap him when he took the matter up again with his New York associates; that is the sum and substance of that meeting;

That the resolution witness said was introduced was voted on by the board; they passed unanimously the resolution.

That the associates Rosene had referred to were associates with him in the plaintiff;

That he, Rosene, stated what his relations were with the plaintiff; that he stated he was the manager or managing director and all the time that Rosene was in Seattle during that season he assumed that position;

That witness was told that Mr. Henry C. Davis was president of the plaintiff at that time. Mr. Davis told witness that he, Davis, was associated with Houseman & Company in New York;

That Mr. Davis was out here (Seattle) after this meeting held in April, in the spring of 1906, a very sort time after that meeting.

That witness had talked with Mr. Davis at that time, met him at the entrance of the Butler Hotel;

(Whereupon the witness was asked:

“Did you notify him or had he been notified, so far as you could tell from his conversation with you of this action of the board of trustees of the defendant company.” To which plaintiff objected as incompetent, which objection was overruled by the court to which ruling the plaintiff and its exception was allowed; whereupon the witness answered:)

That he met Mr. Davis at the entrance of the Butler Hotel, and they walked into the hotel and sat down there and began talking about the Development Company, and Mr. Davis asked witness about the trouble that they were making for Mr. Rosene out here, and Mr. Davis asked witness what it was all about and witness told him; witness told him of the action of their trustees with reference to Rosene's subscription, told him of their action, of the trustees, with reference to this subscription of that \$250,000.

(Whereupon counsel for plaintiff stated that plaintiff's objection goes to all this for the same reason, to which the court assented.)

That Mr. Rosene went to Nome, either on the first or the second sailing of their steamer, the last of June and the first part of July.

That he did not remember exactly when it was that Rosene came back but it was in the fall, perhaps in the early fall, and another meeting of the trustees was called.

At the meeting of September 5, 1906, was the first time that the matter of this subscription came before the board after their disaffirmance in April;

That at the time of the disaffirmance in April a communication or statement was made to the board by Mr. Rosene as to payments he had made on that subscription while he was in New York, which was that he (Rosene) had paid \$50,000.

(Whereupon witness was asked: "What action was taken about that \$50,000; what was done about that," to which the witness answered:)

That Mr. Rosene was to sell that—he was to reimburse them (defendant) even for the \$50,000—that amount was to be made good to the commercial company.

When they met in the September following it developed that other amounts had been paid—witness would refer to the books—but there was one payment of \$25,000 in July—that is a transfer was made of \$25,000.

That at the meeting of the board of trustees September 5, 1906, the question came up as to this subscription to the stock of plaintiff; at that time they agreed to authorize Mr. Rosene to subscribe for \$125,000; at that time the plaintiff owed the \$125,000, which included the \$75,000 which had been paid;

That, as to what arrangement was made as to how this \$125,000 which they authorized the president to subscribe, was to be paid it was already paid excepting that they, plaintiff, owed them fifty or sixty thousand dollars on the books at that time, just simply a question of giving them credit for \$50,000 additional; plaintiff had already been given credit for \$75,000 on this subscription—it was not on the subscription, the original seventy-five was not on the subscription—plaintiff owed that much money to defendant, up until that time they, defendant, did not regard it as a subscription at all; in addition to that plaintiff owed them some fifty odd thousand dollars.

That Mr. Perl explained the state of accounts with the board; Perl was auditor.

Witness, as secretary, had, yes and no, supervision over the bookkeeping and accounting—he had the right and authority at all times to go in and get all the data and information that he wanted from the books—he was the only officer of the company that was there all the time; of course he had supervision of the entire affairs of the company; that in a general way, he kept posted from time to time as to the state of the accounts between the company and the other parties it was doing business with; that he did not know anything about this payment of \$25,000 that was said to have been made some time during that summer; that was made, he learned afterward that Mr. Rosene handed into Mr. Perl a memorandum of that kind and asked Mr. Perl to make that record; that he had seen the voucher, if it was that pencil memorandum initialed by Mr. Rosene and made by Mr. Perl; that witness had no knowledge of it at the time it was paid; might have known about it prior

to 5th of September but did not know it prior to Mr. Rosene's going to Nome.

That witness recalled the minutes where a resolution was passed by the board of trustees with reference to this matter on April 10, 1907.

(Whereupon defendant's counsel read the resolution of April 10, 1907, which had been introduced in evidence, Exhibit I, as follows:

"Resolved, that this corporation does hereby confirm its subscription to the capital stock of the Northwestern Development Company in the sum of \$125,000, par value, and no more, and that the attorney of the company be and is hereby authorized and directed and required to prepare the necessary notice to be sent to the secretary of the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription to the capital stock of that Company was ever authorized in any sum or sums whatsoever except the \$125,000," and the witness was asked:

"Now, what was the occasion for passing that resolution, what brought it up," to which he answered:)

That as he remembered it Mr. Eccles came on the scene along about that time and he brought the matter up again. Mr. Eccles was the manager or managing director of the Guggenheim's; that resolution was passed at that meeting;

That witness would say that he gave a notice to plaintiff pursuant to that resolution; Mr. Hartman was asked to prepare a formal notice to be sent on to the office or he thought the secretary of plaintiff; that Mr. Hartman did prepare such a notice.

(Witness is shown paper marked defendant's Exhibit 3 and testified:)

That was a draft of the latter made by Mr. Hartman; that witness saw that letter when it came in the office; that he would say that the notice witness gave to plaintiff of this resolution, followed the form given by Mr. Hartman in that letter; that he was not quite sure, just when he sent that letter, but it was a matter that was very, very important to them and that notice would have been sent just as quickly as they would receive Mr. Hartman's instructions there; that according to his best recollection, that was the form of notice which he gave; that it was sent by mail, properly addressed and prepaid; Mr. Henderson was secretary of the company and that communication would go to him.

(Whereupon defendant offered in evidence paper marked defendant's Exhibit 3, to which plaintiff objected on the ground of incompetency, and the ruling of the court on the objection was reserved.)

(Whereupon the witness was asked how the financial dealings between the defendant and plaintiff was carried on here in Seattle and Alaska, and answered:)

That the defendant owned the Northwestern Steamship Company, every dollar of its stock, the same board of trustees handled the Steamship Company which handled the affairs of the defendant; that defendant acted as a clearing house for plaintiff; they disbursed all of plaintiff's funds and all of the funds that the Nome plant of plaintiff spent during the season of 1906, in building a large stretch of railroad, was handled through the defendant's accounts, that is their company's disbursements; when Nome ordered any money they drew on defendant, witness was talking about the managers of plaintiff at Nome, including Mr. Whitehead, the banker up there, he had something to do with the plaintiff; when they wanted funds they drew on the defendant here in Seattle, twenty-five or fifty thousand at a time; the defendant would in turn reimburse themselves by drawing on the New York Development Company; so all of the funds of the plaintiff both at Nome and Seattle were handled here in defendant's office; they carried all of plaintiff's freight that summer, amounting into thousands of tons, it went forward prepaid and they always handled their business on a simply cash basis; if the plaintiff didn't have funds, why they carried them until their funds in the bank were sufficient to take care of their cash account. That accounted for all this multiplicity of accounts in their balance sheet, that counsel were discussing.

(Witness was requested to look at ledger account of defendant's books against plaintiff, Exhibit K 1 and asked what amount of charges were made by the defendant against the plaintiff between April 18 and August 31, the approximate amount, and answered:)

That he would have to total that up, those ran into a big sum; would say it was at least \$400,000; that balance on August 31, was \$57,692.00 according to those figures.

That those charges there represent moneys the defendant had paid out for plaintiff during that period of time, or the freight owing to the steamship company, or the lighterage charges owing to the North Coast Lighterage Company or advances made at Nome on drafts drawn by Nome on them, that covers that account; as he had stated that account showed all of the money that the plain-

tiff had spent, both here in Seattle or at Nome that they knew anything about, up to and including that date.

(Paper dated July 25, 1906, shown witness, who testified:)

That was a draft drawn by Doctor Whitehead at Nome for funds that they needed at Nome; Doctor Whitehead was associated with plaintiff at Nome, they, plaintiff, were building a railroad at Nome at that time, and this was just one of the drafts made by plaintiff at Nome on them for funds to keep them in operation up there; that was paid by defendant and charged to plaintiff on the account; defendant would in turn draw on plaintiff at New York and give them credit for the amount that defendant received; that entire account was made up of transactions of that kind; he did not know whether any of the freight items were in that account or not, had not looked it over for that purpose.

(Whereupon witness was shown other vouchers then and asked to state whether those are of the same general character, and answered:)

That he would say they were all of the same order; that was in the regular form that all of these charges came down from Nome to the Seattle office.

(Witness being shown Exhibit AA, testified:)

Those are all payable to the steamship company, and they cover the cost of transportation of the plaintiff's freight from Nome to Seattle, those cover their, plaintiff's cash items for their freight, all of these.

That he would not say without checking up that account that any of those items which are covered by those checks entered into that account, Exhibit K 1, he would have to see whether they were included then but he thought they would not be; to be able to answer that, he would have to run down through these items to see whether any of these were for freight charges or not, but in the ordinary course of business, he would say they did not enter into that account at all, because the plaintiff had their own funds in here and the freight went forward prepaid and as a ship would clear, they would, from the manifest, figure out the amount of the freight earnings and give the steamship company a check for the amount; that would be the natural way of handling that business; it might be the plaintiff would not have any money on hand just at the moment to pay the freight charges, but still we would close the account by giving a check for it.

That in case of freight charges of that kind were closed by giving a check in the name of plaintiff on a bank, payable to the steamship company, he did not think it would enter into that account at all. He did not check it up to see whether any of those checks there correspond to the amount here but he took it that they did not, any of the items in those checks.

Cross examination.

That to his knowledge the directors of plaintiff never had any meetings in Seattle; that he never attended any meeting in New York of the board; never had a dollar's interest in plaintiff; never had a dollar of stock in plaintiff;

That he would say he never gave any proxy to any person for any shares of stock in his name, would not be positive as to that because Mr. Rosene told him when Rosene came back, Rosene said something about having—he referred to having part of the board out here and of course he would have to have some one to represent him here;

That he was closely identified with John Rosene at that time; he and Rosene along with two other associates organized the defendant.

That not always whatever Rosene did in witness' name to further Rosene's interest, would be satisfactory to witness.

That in a transaction such as having witness elected director in one of Rosene's independent companies, in that particular case, he thought, would not be satisfactory to witness.

That he acted as assistant secretary of the company just for the purpose of disbursing funds during Rosene's absence; some one had to do it here;

That he first heard of this organization of plaintiff from Jacob Furth; he called witness into the bank and asked him about this new company they were organizing. The prospectus would rather lead witness to believe that it was another subsidiary of the defendant—and it was soliciting the subscription to stock through the old stockholders of defendant, as he remembered it; that he did not receive a copy of that prospectus; that he received no communication from Mr. Rosene before he came back from New York, with reference to the organization of the company; the first information they had was this prospectus that Mr. Furth asked him about; would not say that he had no further communication until John Rosene came back; he would fancy that he wrote to Mr. Rosene with reference to it, because they were very much exercised over this subscription.

That he would say it was in March that Mr. Furth told him about this, could not say as to how early in March; it was a long time ago but he knew Mr. Rosene was just about ready to go to Seattle when they were first advised of it. Rosene came to Seattle, as he remembered, early in April; the April 12, 1906, meeting was called just as quickly as it could be called after his arrival here; so he only arrived within a day or two before the meeting; up to that time he had heard nothing from John Rosene with reference to the organization of this company except through Jacob Furth; this prospectus was the matter that gave them the greatest concern; would not say he wrote to Rosene about it as soon as he saw the prospectus but fancied he did; could not say positively that he got any response to his letter; his letter would surely be in the nature of a remonstrance; he presumed if he wrote they got a reply; would not say positively even that because Mr. Rosene might have been on his way home here.

(Witness shown paper marked for identification "CC" and testified:)

That he thought he had seen it before; he had forgotten this but he would say that he received it in due course by wire, about its date; that same information was practically in the prospectus of plaintiff.

(Plaintiff offered paper in evidence and it was received in evidence and marked Exhibit "CC:")

That as witness remembered it the substance of that telegram was incorporated in the prospectus of plaintiff.

That he did not have any stock in the company; he noticed by the books there was one share issued in his name; never had it in his possession.

(Witness was asked: "And you never attended a meeting of the board?" answered:)

Outside of signing his checks, outside of signing the plaintiff's checks here in Seattle, as near as he could remember, ten years back.

(Witness was shown a letter marked for identification as "DD" and asked whether he ever saw that before, and answered:)

That he would not say, he might have seen that.

(Witness was shown a letter marked for identification "EE" and asked whether that was not a copy of a letter from his office, and answered:)

That he would say so, it looked like it, and the stenographer that used to do his work.

(Witness was shown a registered mail receipt marked for identification "FF," and testified:)

That was Mr. Perl's signature on the receipt.

(Whereupon plaintiff offered in evidence Exhibits DD, EE and FF and they were received in evidence and read to the jury.)

That "H. J. S." was the stenographer.

That this meeting of the defendant in April, 1906, would be a special meeting called for that purpose.

Could not tell without reference to the by-laws how long a notice was required to give for a special meeting.

That he could not state the dates, could not say, when this meeting in April, at which subscription was repudiated, was held; those minutes were kept by him;

That this meeting of defendant's board in April, 1906, called shortly after Rosene's return to Seattle, at which this question was discussed, Rosene reported this subscription to the board; witness was the secretary of the company at that time; it was his duty to keep the minutes;

That in this instance he did not keep the minutes; that as before stated they did not take any minutes of that meeting for the reason that they did not want to embarrass Mr. Rosene any more than was necessary, in order to help him to get out from under this difficulty; that he could have had a memorandum of the transaction without inserting it in the record, and could have preserved that but he did not do that;

Did not remember of requesting Mr. Hartman to make a memorandum of the minutes; Mr. Hartman was there and witness talked the matter over with Mr. Treat before he, Treat, invited Mr. Hartman down there; they wanted to do whatever was necessary to preserve their legal rights in the matter; that was why Mr. Hartman was there; he usually did not meet with them in their trustees' meetings;

That he had heard only a part of Mr. Hartman's testimony yesterday;

Didn't think he was here (in court) at the time Hartman made the statement that he, Hartman, made a memorandum of the minutes in order to be able to draught the proper resolution;

That he could not say who, at that time offered the resolution repudiating the subscription; Mr. Treat and Mr. Thomsen were the ones that were more active in the discussion of this entire matter; Mr. Rosene was in the chair; would say that Mr. Rosene put the motion; he always did, he always was in the chair when he was present and he was there at that time; and this motion was put by him;

Would not say that the secretary read it before it was put, would say that the motion was made—didn't know whether it was in writing or whether it was just simply a verbal motion; could not say as to that positively; it was a very important matter; it would impress itself on his mind at that time so much so that he would have some memory of the method in which he disposed of this \$125,000 transaction, or this \$250,000 transaction; he was just as positive as anything in the world that that motion was put and they repudiated that subscription and it was so understood by every single trustee present; it may have been put both orally and read from a paper, it may have been handled both ways—it is ten years ago.

If read from a paper, he could not tell what became of it; any formal resolution reduced to writing might have been in the secretary's hand; that might have been the natural thing, as they were all sitting around the table, and if there was no record to be made or kept of that meeting, there would be no occasion for keeping that particular resolution; witness would not keep it anyway because the only minutes that he kept of any of these trustees' meetings were right there in that book.

That he would not keep a separate memorandum in writing showing what the transaction of that board of trustees was after it was determined by the board not to put it in the official minutes, because it was unanimous that the matter was repudiated;

That he said this matter next came before the board in September after Mr. Rosene came down from Nome;

Returning to the April meeting, Mr. Rosene was to dispose of the stock of this subscription and get us back even the \$50,000 that he had paid, they were to be reimbursed for that amount;

That he learned later in the year before the September meeting, that there had been an item of \$25,000 credited on the open account for plaintiff on their books; not on this subscription; all that he learned about it was just as you see on that memorandum; he noted where Mr. Rosene had given Mr. Perl instructions—if witness could refresh his memory, where Mr. Rosene had given Mr. Perl instructions to make that entry on his books;

That this memorandum read that it was on the subscription; it looked that the whole item as shown by the voucher was a credit

on the subscription; it read that way; that was the memorandum which he saw prior to September, that is when he discovered that an additional amount had been paid or given credit on their book. Witness had access to the books;

That Mr. Perl, the auditor, would have taken instructions from witness, also from Mr. Rosene.

Witness did not instruct Mr. Perl to charge back this item of July 15, of \$25,000, as shown by that voucher;

That was an item similar to the \$50,000 already gone into the same channels as that \$25,000 that was not anything they could do until Mr. Rosene returned to Seattle.

(Witness was shown Exhibit K 1 and asked to show how much his Company owed the plaintiff on July 15, 1906, and answered:)

They didn't seem to be balanced on that date.

Would not say the Commercial Company (defendant) was indebtedness to Development Company (Plaintiff) in the sum of \$75,000 on that date; would say only fifty; they are credited on June 25 with \$25,000; on July 7th with fifty and then on July 9th they are charged with \$25,000 and then on the 26th they are charged.

On the 15th they are credited with \$25,000; that would leave \$75,000 to their credit up to the 15th—yes.

That it would have been feasible to have charged this item of \$25,000 that is in the voucher of July 15th back on that account—there were funds there on the plaintiff; but counsel seemed to overlook the fact that this defendant was provided at all times with funds to disburse the plaintiff's expenditures.

They started in from the inception of the plaintiff to do it and they were—they did not want to do anything to harass the plaintiff, but they wanted to keep plaintiff's fund on hand at all times because they did not know what steamer might come down with a draft on them and they wanted funds on hand at all times to take care of their affairs, their indebtedness.

That they drew on New York to reimburse themselves for any payments they made for plaintiff; they were simply a clearing house.

(Witness was then asked: "Now on the 15th of July you find your company owed the Development Company \$75,000—now why didn't you charge back this item, if that had been wrongfully credited to them," and answered:)

Why charge it back, that he would not have charged it back until Mr. Rosene came back.

That on September 5th he might have gone in there and looked over the accounts, and he often did;

That on September 5th, this plaintiff company owed them \$57,692, which added to the \$75,000 which had been charged against their company and credited plaintiff, would make a little over \$125,000.

(Witness was then asked: "And it was for the reason that these accounts about balanced in that way, that you said, 'well, we will take \$125,000 of this stock and call it square,' " and answered:)

That might have entered into it, but they decided to take the \$125,000 of that subscription; that was what they decided to do; their books showed that they had already been paid a certain amount on the subscription so that they decided, after discussing it very, very thoroughly, that they would take \$125,000, because they took it up and discussed it and decided to make it; this controversy was hanging all summer.

(Witness was then asked: "What controversy was there if you had repudiated this subscription," and answered:)

That they were doing business for the plaintiff and Mr. Rosene always contended that they should make a subscription to plaintiff's stock, so that after Rosene came down in the fall, they decided to subscribe for \$125,000.

The plaintiff had \$75,000 of their money already and perhaps \$100,000; plaintiff owed them \$57,000 more on open account; decided to dispose of it one way or the other, whether they were going to subscribe or not—they decided to subscribe and authorized him to subscribe.

(Witness was then asked: "And it was not because they were indebted to you and you could not collect the money, as Mr. Hartman suggested yesterday—that was not the reason, was it," and answered:)

That he did not think that plaintiff ever let a draft go to protest at this time; that there had been no repudiation of plaintiff paper;

That he didn't know whether plaintiff was financially responsible or not—would not even say that one of the drafts did not go to protest; would have to look it up and find out.

He would like to look up the account and see—if the books

say they paid plaintiff \$32,000 in October to balance that account, he would say they did.

That Mr. Rosene did not finally persuade the board that the investment was a good investment because if counsel would refer to the minutes he would find that it authorized him to turn right around and sell down to \$50,000 if he remembered right.

(Witness was then asked: "Now, why, having only \$75,000 invested in this subscription, why raise it \$50,000 more and then on the same day authorize a disposal down to fifty," and answered:)

Why do it. It was their way of doing business, and then they wanted to sell down to \$50,000.

(Witness was then asked: "Why not sell down from 75 to 50 and not put in 50 more," and answered:)

Plaintiff owed defendant fifty and they (defendant) wanted to close that account.

(Witness was then asked: "Was that the only reason," and answered:)

Well, yes and no. They wanted to close it up and make—if they were going to do anything they wanted to make a subscription for the \$125,000; they decided on that, and they decided to close their account on that basis, and they immediately authorized Mr. Rosene—he was going to New York, as witness remembered, very shortly to sell them out to \$50,000 and witness was not sure but what plaintiff was getting very low in funds about that time; he would have to look it up;

That they still had to provide for the drafts coming down from Nome to cover the season's work.

That they might have been advised as to the funds available down at New York to cover those drafts; New York was being advised at all times to the amount of expenditure up there at Nome;

Witness didn't know, when they decided to just take \$125,000 stock on which \$75,000 had already been paid, that they (or whether they) credited them, plaintiff, the other \$50,000 in lump on September 5, 1906; he could not tell from those books.

(Whereupon the witness was asked questions and answered the same as follows:)

Q. Look at the record—is there any item of \$50,000 cred-

ited to the Development Company on September 5, 1906, or September 6, 1906, the following day?

A. This here looks like a pencil memorandum.

Q. I do not want any pencil memorandum—is there any permanent record in ink?

A. Is this in ink?

Q. You can tell whether it is.

A. Is that a pencil memorandum?

Q. Yes, sir, that is a pencil memorandum—here are the items, is there any item of \$50,000 audited to the Development Company?

A. Not against that \$57,000, no, sir.

Q. If you decided to take the \$125,000 in stock, that is to put in \$50,000, why not give them credit for it on September 5th?

A. They seemed to have entered it up here after this \$25,000 item.

Q. Those are Mr. Ford's memoranda, he said they were an investment, and he put them there?

A. If the first one of September 6th is on account of that subscription and the other on the 25th—that is just simply a matter of detail as to when these instructions went to the auditor's office.

(Witness continued:)

That after the board determined to take \$125,000 and to credit the balance, which would be \$50,000—to credit plaintiff with that balance—they made two credits of it, instead of one; probably that was just bookkeeping that was all; there must have been a reason for it at that time, but he could not tell why.

(Witness being referred to vouchers that counsel for defendant exhibited to him asked: "These do not show a draft drawn on the Commercial Company, do they?" and answered.) That they handled them just the same.

That he would have to look at the draft to answer that question; that those vouchers showed drafts were drawn on defendant; if they were not the defendant took care of them; that he was going to say still they were drawn on defendant.

That record, witness had in his hand, showed that they were drawn on John Rosene, chairman of board of directors of plaintiff company;

This account for \$51,703 did not make any memorandum of that at all, and there was another numbered 5554, made no reference to that at all; it does not say on whom they were drawn; but all these drafts at Nome came through exactly the same channels and they were treated exactly the same one with the other.

The defendant was the clearing house, taking care of the drafts and drawing on New York to cover itself; it would not have made any difference how those drafts came down, they were all treated exactly the same.

(Witness shown Exhibit K-1.)

That the balance of September 5, 1906, against the plaintiff was \$57,600 as he had theretofore testified;

That he found an item of \$40,000 there to the credit of the plaintiff on September 5th, that was not included in the \$57,000; that was where they made another draft on New York for \$40,000, at that time;

That defendant gave plaintiff credit there for \$40,000, and defendant would not get that money until that draft was paid;

From defendant's books, assuming the draft was paid, it would show that that additional amount was to plaintiff's credit; that the draft went though the bank and defendant took credit at the bank for it and defendant credited the company for it;

That it was not an error when witness testified on direct examination that that particular piece of paper (Exhibit K 1) showed, by the entries on that paper, that plaintiff was indebted to witness' company for \$57,000, because this balance—at that time this balance shows it was \$57,693.

That the balance was struck August 31; and on the 5th of September there was a \$40,000 credit.

(Witness was then asked: "And that would leave \$17,000," and answered:)

That counsel seemed to overlook that fact that Nome was wiring, at all times, that they were drawing on Seattle to cover expenditures there. Defendant, in turn were taking care of the finances at this end and would make drafts on New York to keep their account good here—at all times defendant did that, right from the inception.

That the balance on August 31, was \$57,600; that on Septem-

ber 5, then they had a credit for \$40,000, that reduced the balance to the difference between the one item and the other, which would be \$17,692 on the 5th day of September, 1906.

Redirect examination.

That was the first time witness ever received or saw any certificate of stock in plaintiff company in his name, in letter from Mr. Rosene written witness from New York October, 1906 (letter which had been shown witness.)

That he followed Mr. Rosene's instructions and sent it (one share of stock in witness' name) back.

It was never in witness' possession at any time after he received it by mail and sent it immediately back.

(Witness' attention being called to minutes of meeting of plaintiff's stockholders, on March 29, 1906, which recited there were present by proxy stockholders, among others, witness, "J. D. Trenholme, by Millet W. Baldwin, proxy one share," and was asked: "Did you give Mr. Baldwin any proxy to represent you at the stockholders' meeting on the 29th day of March, 1906?" and answered:)

That he didn't think he had ever heard of Mr. Baldwin before.

That he might have on 29th March, 1906, heard of plaintiff because that would be just about the time that Mr. Furth would have called his notice—would have called him into his bank and advised or shown him this prospectus.

That was before Mr. Rosene's return to Seattle.

That he had never heard that he had been named or that any stock had been issued in his name, at that time; that he would say he had never authorized any representation at that meeting, no; that he did not think that he ever authorized any one to represent him at any stockholders' meeting.

That why his company agreed in September meeting of 1906 to authorize the President to make a subscription for \$125,000 and immediately at the same meeting passed a resolution instructing the president that out of that \$125,000 to sell that stock down to fifty, was because of the indebtedness of plaintiffs to defendant at that time; and it was also on account of the company wanting to make their subscription whatever they were going to make, and it was for the further reason of helping out the plaintiff in the finances elsewhere;

Plaintiff was getting at that time very short of funds, and the

drafts were coming down very fast from Nome, and defendant was advised of their requirements up there, and defendant was providing for funds to take care of those drafts.

That witness was not a real good bookkeeper but he could understand books.

(Witness shown Exhibit K 1 and asked to state at what time the account of plaintiff with defendant had been balanced last before their September 5th meeting, and answered:)

That it was a running account all summer as he remembered it; it was balanced from time to time; July 27, it shows a balance here—no—it was balanced then but they had a credit of \$85,000.

August 31 was the last balance that showed at that time that plaintiff owed defendant \$57,000.

That was the way the books stood balanced up to the 5th of September, the day after their meeting.

That any statement which had been made by the accountant or auditor as to how the balance stood of this account on that date would not have shown that \$40,000 at all.

That the \$40,000 would not be under discussion at all at the time they were discussing that balance of \$57,000;

That \$40,000 would represent a draft which would be drawn by the defendant and go through New York for collection; and if it was paid defendant would get credit for it; and if it was not paid it would be charged to defendant here; that it would take about ten days to actually get the funds in the ordinary course of business; so that the account stood at that time that the \$57,000 already credited on this account of the plaintiff and the plaintiff still owed them \$57,000; and defendant agreed to take \$125,000 in stock; Mr. Rosene at that time was still chairman or managing director of plaintiff; didn't know whether Rosene was satisfied with that adjustment of this controversy at that time or not; he, Rosene, had to be satisfied; it was the action of the trustees at that time.

(Witness was shown a voucher Northwestern Development Incorporated, to Northwestern Commercial Company dated October 29, 1906, August 10th draft issued at Nome by Caleb Whitehead, Assistant Treasurer of Northwestern Development Company, on John Rosene, Chairman of the board \$20,000; draft to Northwestern Development Company, charge Northwestern Development Company, accompanying which was this voucher on the bank, "Northwestern Commercial

Company to Northwestern Steamship Company, entered August 20, 1906, credit N. C. L. Co.," and asked what does that mean, and answered:)

North Coast Lighterage Company; that was owned by the defendant; that \$20,000 was a credit to the Lighterage Company account; that meant that the plaintiff at Nome owed the Lighterage Company for lightering goods and here was where they had drawn on them to cover this account, \$20,000, to the Lighterage Company; he supposed on August 20th John Rosene would be either at Nome or en route to Seattle, about August 20th or he might have just arrived here;

When that draft came in here defendant would pay that draft just the same as they would pay any of the other drafts, and charge up that amount and issue a check for it on plaintiff's fund and pay the draft; that is dated August 20th—the charge is made August 10th, it is dated August 20th.

(Witness was asked to state whether he found the plaintiff charged with that \$20,000 on Exhibit K 1, account of plaintiff with defendant, and answered:)

There was a charge on August 20th of this same amount and he presumed it was the same identical charge; Exhibit K 1 refers to "V 5673" and it carried with it the same voucher number; that voucher number there V 5673, that was entered there; so that in that way the debt of the plaintiff to North Coast Lighterage Company which was owned by the defendant was satisfied, and the plaintiff charged with the same amount to the defendant; the entire transactions of the entire year were carried on in exactly the same way;

(Witness was shown item which appeared to be voucher of the Northwestern Commercial Company account—Northwestern Development Company, credit North Coast Lighterage Co.—draft issued at Nome on John Rosene, chairman of board N. W. Development Co. \$30,000; on which voucher it said "Northwestern Commercial Company to Northwestern Steamship Company, August 9, draft issued at Nome by Caleb Whitehead, assistant treasurer of Northwestern Development Company, on John Rosene, chairman of the board, \$30,000, draft to N. W. Development Co., charge Northwestern Development Company No. 5511" and asked was that the charge there and answered:)

Yes, that represented an indebtedness of the plaintiff to the Steamship Company which was paid to the Steamship Company by this draft on their chairman, which defendant took up and

charged to plaintiff; this was Lighterage Company business; this was the cost of lightering the goods from ship to shore; this \$30,000 charge;

That a similar item under date of July 26 is a voucher, No. 2428 for \$25,000, which was a similar transaction that seemed to be the Steamship Company; it was credit to Steamship Company, that was for freight charges, \$25,000; the "OK Perl" was Mr. Perl's handwriting, who was auditor of the Steamship Company; and of the defendant and of the plaintiff too, he thought.

(Witness shown debit notes, voucher 5498)

Voucher No. 5498 he would have to get Mr. Ford to run that down; it says "A. B. & S. D. Co." that was Alaska Bank & Safe Deposit Company, Mr. Whitehead's at Nome; that was \$25,000 and there was another \$50,000 to Nome; that is a debit note of defendant;

(Witness shown Voucher 5554 one item \$25,000 debit note, home office, draft on John Rosene, chairman of the board, and another deposit on the National Bank of Commerce, aggregating \$3000.)

That was where they got credit for it, wasn't it, well, that might be charging the Commercial Company and crediting the Development Company; that Mr. Ford could tell about that, witness couldn't.

(Vouchers offered in evidence by defendant and received in evidence and marked Exhibit No. 4;)
Recross Examination.

(Witness asked if he would look up the by-laws of the Company and advise the jury what notice was required to the trustees for a special meeting; minute book of defendant company shown witness; witness reading from minutes:)

"Regular monthly meetings of the board of trustees to be held on the first Monday of each month, and the majority of the board of trustees shall constitute a quorum for the transaction of business."

(Witness continued reading from minutes, by-laws respecting notice required to trustees of special meeting of board of defendant:)

(Witness asked to name members of defendant's board in April, 1906, and testified:)

That he would have to refer to the books to tell; he thought the annual meeting was along about in August; perhaps in April;

(Witness requested to ascertain from minute book who were the trustees.)

There was Rosene and Williams and himself and Jarvis and Mr. Moritz Thomsen, April 18, 1906.

March 30, 1906, there was Mauritz Thomsen, Trimble, Treat, Williams, Trenholme, Jarvis and he knew Mr. Greenough, who resided at Missoula, Montana. Mr. Trimble was living here at that time; Mr. Greenough was over here a great deal of the time at that time; he was here at that meeting on April 12, 1906; didn't know whether it said so.

At the April 12 meeting there was Mr. Rosene, Trimble, Jarvis, Trenholme and Williams;

Witness did not say that was the meeting when, he testified, that the subscription was repudiated;

That meeting was shortly after Mr. Rosene returned from San Francisco en route from New York; that was not on April 12th; it was the early part of April, just after Mr. Rosene returned, would not attempt to say it was before April 12th; could not say whether it was before or after, it was in the early part of April; if there was no record in the book of any meeting prior to April 12th there was no meeting; there was a special meeting, besides the April 12 meeting, on April 18th, that was a stockholders' meeting;

There was none other excepting the meeting that witness and counsel had been discussing here, the trustees' meeting April 18th, Mr. Greenough was present at that meeting, no other meeting in April;

That counsel could not pin witness as to the time of that meeting; witness would say it was immediately after the return of Mr. Rosene from San Francisco;

That Mr. Rosene came along very shortly after the date of the telegram read in evidence, April 3, could not say as to within a week; it was in the early part of April; thought Mr. Rosene arrived before the annual election; thought possibly Rosene was here; Rosene had a lot of proxies here on April 18th and so witness would say he was here prior to that time; would say that the meeting at which the subscription was repudiated was prior to annual election; because it would be one of the first things—it was the first thing taken up and discussed after his arrival.

Would say that due notice was given to all the trustees of that special meeting in April;

That he would say that the meeting of trustees at which this subscription was repudiated was held prior to the annual election;

Would say that that notice was given of that meeting; Mr. Greenough was present at that meeting, was not talking about April 12th now.

Question: "You notice by the minutes of April 12th he was not present—he could not have been present:

Answer: There may have been a similar error in regard to that as in regard to the other."

Question: "Now, what notice was given?"

Question: "For the meeting of April 12th?"

Answer: "It says 'waiver of notice of said meeting having first been signed.'"

(Witness, continuing, testified:)

Answer: "For what meeting?"

That he could not tell who signed that waiver; that he had not seen it; it was a special meeting called according to the record; could not tell whether Mr. Greenough signed that notice without seeing the waiver; there were no minutes kept of the trustees' meeting, at which this subscription was repudiated; there were no other transactions taken up; and no minutes of anything not even of those present; there was no record kept of it whatever;

That counsel had been told a dozen times that that record there of April 12th is not the record of the meeting at which the subscription was repudiated; Mr. Grenough was here at the meeting at which the subscription was repudiated.

Witness excused.

Whereupon, with the consent of counsel for defendant and of the court, plaintiff was permitted to withdraw the tender it had made previously of the 25,000 shares of common stock and 25,000 of preferred stock and immediately retendered it, under the terms as before, together with the war revenue stamp attached, so that plaintiff's tender now was with the stamps upon them.

Whereupon the court overruled the defendant's motion for non-suit, such ruling going to that reserved ruling on the admission of the evidence of the minutes of the meeting of plaintiff's board in Seattle and the court overruled the defendant's objection thereto and permitted it to go in; and therefore documents were received in evidence on behalf of plaintiff and marked Exhibits "D 16 and T 5."

WILLIAM J. FORD, recalled as a witness on behalf of defendant, testified:

(Witness' attention being called to Exhibit K 1 and defendant's Exhibit 5, he was asked whether the items thereon, Exhibit No. 5, marked "debit note number 9 and debit note number 3" were charged against the plaintiff on the account shown on Exhibit K 1 and he answered:)

They were.

That those debit notes represent a charge from the Nome store to the home office in Seattle for two drafts, one for \$25,000 and the other for \$50,000, drawn on John Rosene, chairman of the board of directors of plaintiff; that voucher, in connection with those debit notes, would indicate that the Nome store had received these two drafts either in exchange for money or supplies, and being drawn on the Seattle office they were charged to this office for clearance and were charged direct to the Development Company account here in Seattle. If that transaction took place in that way that was a correct entry, a correct charge.

(Defendant offered paper in evidence.)

(The witness:)

One of those is \$25,000 and the other \$50,000, there are other items on that debit note which have no bearing on this case.

That debit note meant a debit memorandum, not a promissory note; it did not show upon whom the \$50,000 draft was drawn but it did the twenty-five;

Did not know who was the manager of the Alaska Bank & Safe Deposit Company; those drafts, according to this record were sent by Caleb Whitehead, assistant treasurer. Did not mean the draft for \$50,000; meant that the one draft of twenty-five was sent by him.

(Counsel for defendant thereupon read debit notes, as items of \$25,000 and \$50,000 charged on Exhibit K 1 to the defendant by plaintiff.)

(Witness shown paper marked for identification defendant's Exhibit 6 and asked what it was, and answered:)

That it was a journal entry similar to the one counsel had here, including the two debit notes, one of them number 11 for \$25,000 covered draft drawn on the home office against John Rosene, chairman of the board, and charged to plaintiff, from that

journal entry; that was only the one item of \$25,000, and that was one of the items which was charged on that account.

(Paper marked Exhibit 6 offered by defendant and received in evidence.)

(Witness continued:)

That he had been and was the auditor of the defendant, and had charge of its books and was familiar with those books; that there had never been any item credited on those books of the indebtedness of the defendant to the plaintiff on that unpaid stock subscription which was being sued for him; that it had never appeared on the books of defendant at any time as a liability of that defendant.

Witness excused.

JOHN ROSENE, recalled as a witness for defendant, testified:

That he had been sworn; that he had resided in Seattle seventeen or eighteen years; was acquainted with the plaintiff in this case; was one of the promoters or organizers of plaintiff;

That he went to New York in December, 1905, Mr. Williams, who was then vice president of the defendant, came to him and said that Mr. French, commonly known as Major French, was anxious to have witness become a director for the Kugarok Corporation in connection with which they (we) were doing they (we) were building a railroad and doing some development work in the Kougarok district; the railroad being on the Seward Peninsula; and witness declined to do this at first but after Mr. Williams came the second time witness agreed to look into the matter. After witness had looked into it he declined but he came again; eventually during the winter, the position arrived in February, 1906, when witness thought the ownership of the then Arctic Railway or the Nome Arctic Railway, now the Seward Peninsula Railway—would be a good business for defendant. So witness made up a little synopsis of such an idea and one morning in the restaurant of the Waldorf-Astoria, he handed the slip of paper to Mr. Arthur Housman of the banking branch house of A. A. Housman & Company, and said "Arthur, please—"

Mr. A. A. Housman was a member of the New York stock exchange, a stock exchange broker and banker in that class of banking; handed the paper to Mr. A. A. Housman—witness made it up himself; so witness asked him to take it down to his office and late in the evening or the next day, give witness his view of that as a railway to work in the north, that could only work a few months in the year.

That evening witness saw Mr. Housman and he hunted for witness in the Waldorf about seven o'clock and surprised witness by showing witness he had taken that piece of paper that witness had given him, word for word, without any knowledge or consent on witness' part and cabled it to a man named Fisher at Dundee, Scotland, urging Mr. Fisher to go to London and start a man by the name of Myers to come over and do this business and at the same time as he had this—this had taken place about practically twelve or fourteen hours since witness gave him the paper—he also had a cablegram from Mr. Fisher and son from London saying 'Leaving for London immediately'. It so happened that that did not please witness because he was committed to Haldron & Company, another banking house, for this particular business and he was unwilling to do it, but the next morning Mr. Housman had a telegram—two of them—one from Fisher at London and the other from Mr. Myers at London, that Myers would leave on the following Saturday steamer for the purpose of doing this business. And with that Mr. Housman figured, or felt that he had witness committed stronger to him than to Haldron & Company, and that Mr. Myers would get it. Myers came in due course. The first time witness saw him he had been pretty seasick and he had laid up in the St. Regis Hotel a few days after he got ashore, trying to get over it and he said to witness, he said "Mr. Rosene, I am glad to meet you, but I am very sorry to have come on a mistaken errand. I find that this railway is one which can only run for four or five or six months in the year. We have no clients for that kind of securities and I cannot do that business."

Witness said promptly: "Mr. Myers, I am very glad of it—I can go home tonight." But there was some things about it and secondly Mr. Myers and Mr. Housman and Mr. Farquhar, whom witness had never known that time until he came to the Waldorf-Astoria that evening to look for witness, and Mr. Myers' statement was, in effect, that while he could not handle the bonds of a railway that only operated a part of the year, he could finance the transaction if it had other business, like mining properties, and that he had been told through Mr. Housman that there was some possibility of obtaining mining properties in connection with the enterprise, and they wanted to know what witness had to say about that. Witness told them of this plan of Major French, of him having the mining properties and Major French was communicated with that evening on the telephone at New Rochelle—witness was not quite sure about it but any way the next morning—and it developed then that, while French had the right to sell these mines, he did not have the title—that the title stood in the name of a man named McConnell, and he was in Seattle and had to be sent for; witness had no interest in those mines; had never heard of them ever; so, while McConnell was coming on the way, there was plans made and

Mr. Myers and Mr. Farquhar or both, sent to Boston for an attorney whose name witness didn't for the moment recall, one of the names in the firm was Storey, or something like that—they were attorneys of record for this plaintiff, so it should be easy to find. And the plan for the organization of a company on those things—Judge Dubois who was there—he had the deed for the mining property but he did not have the right to transfer or make any deeds, but he had them and he had made an examination of those titles; he had made an examination of those titles during the previous summer for the purpose of facilitating the sale of those mines or whatever his plan was.

Judge Dubois was a lawyer in Nome, then in New York. In New York witness rather thought Dubois represented himself and any client that came up; but he was representative of French and McConnell in this transaction as attorney and he became representative of the plaintiff a little later, so far as passing on titles. So, after these attorneys came from Boston it was decided to have a company that should own these mining claims as soon as the man should come that could sell them; and own a railway to connect those mining claims to tide water at Nome.

French's plan had always been to connect those claims with tidewater at Port Clarence Bay, or as we call it, Teller—which witness opposed; and after that had been agreed on the price was agreed on as \$245,000.

That was agreed with Major French, because McConnell was not there yet, but they had telegraphed backward and forward and they had it all arranged among themselves.

This \$245,000 was the price of the mining claims.

After that had been agreed to and the corporation outlined in conversation and perhaps in document, witness gave but little thought to the matter—it was suggested by Mr. Myers and agreed upon by Housman and Farquhar, agreed not to witness—that they would make a different corporation—a thing witness had never anything to do with before—with common stock.

They explained the reason for making the common stock so as to use it as a bonus in connection with floating the preferred stock and as a bonus and profit to the promoters and insiders, if you like to call them that. That witness did not like very much but they explained to him that in England—Mr. Myers in particular—that was a very desirable feature of it, and so, where everybody else was unanimous that the thing was right, there was no use in witness saying it was wrong. It did not make any material difference to witness one way or the other, so that it was

agreed to. And, then as soon as Mr. McConnell came, or within a day or two afterwards, the question came up, they did not want this transferred—this arrangement made with McConnell because they didn't know him—he was a stranger. Witness meant Housman and Farquhar and Myers and those gentlemen didn't—they had some idea about Major French that witness didn't know exactly, but any way they thought that witness was the man to take the responsibility for this stock so that it would go the way they wanted it; two and a half million of it into the treasury, or so the treasurer, and a million and a quarter to the promoters, and witness asked those attorneys if there was any objection—if he was taking any chance or liability in doing this and they said no, and so he agreed to it and in due course Mr. McConnell signed a deed that this gentleman had prepared from him to witness and at the same time witness signed a deed from himself to the company.

That was the deed from Mr. McConnell to witness conveying those Alaska mining claims;

And witness immediately passed it on to the company by another deed.

The title was in witness probably five minutes and probably not more than one minute.

Witness believed that that price, \$245,000, was all agreed on as between McConnell and French prior to that by telegraphic correspondence—if there was any real discussion, except that he agreed to accept that, that is the only thing that witness knew of—if there was any other discussion witness didn't know it.

Well, then, after they had agreed to the plan for this common stock in this fashion, they (we) struck another snag in the fact that Mr. McConnell did not want to take anything but \$245,000 cash. The company was not yet organized and had no funds and it would have been some days before it could be done, and somebody—Mr. Myers was there, he was anxious to agree to get an option—he was willing to pay \$25,000 flat for an option on half the capital stock; that is one-half of the two million and a half, that is one million and a quarter, and he did pay \$25,000 for it and he said the only reason he would not take it over was he had a partner by the name of Manter in London and he was not in a position to make such a transaction except justified by his partner. Mr. Housman said he would take whatever Mr. Myers would not take—that is the firm of Myers & Manter. Mr. Farquhar said he would take \$250,000, witness said "Then I will take \$250,000 for the Commercial Company" and Housman said: "I will take \$50,000 for myself" and witness said "Then I will take \$250,000 for the Commercial Company." They (we) agreed then and there that business was done.

It was the common consent among us that the business was done then and there when Mr. Myers was willing to take half a million dollars provided his partner agreed and he was sure he would agree, and Mr. Housman was willing to take half the stock and anything more that the other fellows would not take; Farquhar wanted \$250,000 and witness wanted \$250,000 for the Commercial Company, and then \$50,000 for each of ourselves. So, in other words, it looked then and there that that business was overdone so far as over-subscribed, as soon as it could be put in formal state.

Furthermore, witness insisted that Housman could not take any subscriptions until the stockholders of the Northwestern Commercial Company had been given an opportunity to take anything they wanted of it. So that there was a demand from all sides.

(Witness' attention was directed to his statement that Mr. McConnell raised some objection to parting with this title to the mining property until he could see the money, or a reasonable creditor for it, and was asked what was done about that, and answered:)

Mr. Housman and Mr. Myers and witness, by the use of \$50,000 from Mr. Housman and \$25,000 from Myers and he believed \$50,000 or thereabouts from himself, made up a pool, that made, if he remembered correctly—that was a detail he was not quite sure of—and he loaned to the plaintiff his checks and notes several years ago and they never returned them and he was not in a position to refresh his memory—but anyway he believed that he paid Mr. McConnell \$125,000 in cash and gave him, witness' own personal note for \$100,000.

That was at the time he passed title to witness and witness passed it to the Company.

(Witness' attention was directed to his statement that under the plan, the common stock, was all to be used as a bonus, two and a half million of it to be turned back to the treasurer to be a bonus on the preferred stock and one and a quarter million of the common stock to be turned over to the promoters and was asked—who were the promoters, who were to share in that million and a quarter of bonus common stock; and answered:)

Well, as far as it ever went on record, it would be himself, Mr. Housman and French.

That million and a quarter of common stock was to be divided between (us) three gentlemen, then the promoters of the company.

The plaintiff never received any payment of any kind for that million and a quarter of common stock that was issued to those promoters; it never received anything whatever either in money or property for the two and a quarter million of common stock that was turned over to the treasury, that was to be used as a bonus on the preferred stock.

Witness went up to Boston to get a lawyer to organize the company, and he organized it. He didn't believe that those things were completed when he left New York because he had been delayed there so much that they were still working at that, but he was the only attorney that witness saw in connection with the matter and witness believed he did it all.

Didn't believe that he saw the articles of incorporation drawn up by him for plaintiff;

Witness was too busy, he had too many other things to do and he would go into Housman's office about ten or fifteen times a day when they would ring for him—and he would come out and he did not read any of those papers; he just signed such as they told him was proper to sign.

He saw the by-laws adopted by plaintiff, some months later he believed; if it required his signature or any part of it he would be sure to see the resolutions that were passed by the board of directors of plaintiff authorizing payment to him of \$245,000 cash and \$3,750,000 in common stock, as a consideration for the conveyance of this mining property—he never read them.

He understood at the time that there would be resolutions or that the matter would be put through the minutes of that company so as to show that the consideration for the mining property was \$245,000 in cash and \$3,750,000 in common stock instead of merely \$245,000 cash; that was the arrangement he objected to strenuously, because he thought it was useless, nonsensical and useless.

The grounds of his objections were because any value—he was interested in the matter more largely from the railway point of view so as to connect with the steamers—any value that was in the claims over the \$245,000 that they actually paid for them, could go just as well to the preferred stock as to this bundle of common stock, and there was not any sense in that arrangement that he could see.

The explanation given to him for insisting upon putting it through in that form was that they could handle it better and make more money out of it, particularly on the London market.

(Witness was asked: "Was the question discussed with this Boston attorney during that time as to whether there was any way they could get this bonus stock in such a manner that there could not be a legal liability against all of them for it" and answered:)

As he had said before he was in there so few minutes off and on—any discussion—he remembered it was assured around that it was all right and legal and it was all right, financially it was a good thing to do and legally and anything like that—he didn't know anything about it, and for one he didn't think so; and he didn't today either.

He had heard the names of the incorporators and of the men whose names were inserted in the articles of incorporation the other day, he thought that was the first knowledge he had of it—he didn't remember those names; he didn't know who those gentlemen were; they were not parties to the transaction, they were not at the New York conference.

So far as he knew they had no interest in the company. This gentleman from Boston selected the men whose names would be used in the articles of incorporation in going through the forms of incorporation, and witness was inclined to think he (the man from Boston) made a run either to Boston or Portland, Maine in connection with that—witness remembered he was absent—witness was sure he went as far as Boston one day—but he was the one that made them.

He did not know Clarence E. Eaton holding three shares, James J. Hernan holding two shares, George C. Ricker holding two shares, W. F. Crummett holding two shares, J. L. Brophy holding two shares, the original incorporators.

He knew Arthur A. Housman, Henry C. Davis, L. H. French, George Henderson, Edward A. Pierce, directors at the time of the passage of the resolutions for the purchase of this mining property.

Mr. Arthur Housman was the same Housman he spoke of as the man who was to get his share of this million and a quarter bonus stock.

Henry C. Davis was a partner of A. A. Housman in the firm of A. A. Housman & Company.

Edward A. Pierce was one of their chief clerks and probably manager under Clarence Housman, or something like that—he had a responsible position in Housman's office; was an employee of A. A. Housman & Company.

Leigh H. French was the gentleman he mentioned that Mr. Williams wanted witness to become a director of his company, early in December, and that led up to this whole business.

That was the same French as he said was one of the men who was to share in the million and a quarter bonus stock.

Mr. Henderson used to be one of the managers for R. G. Dun & Co. in Texas, in fact was manager for R. G. Dun & Co. for years and then he went into New York and went into the finance business in connection with B. F. Yoakum; and Henderson and witness became very good friends, and when this business came up witness asked him whether he would be secretary of the plaintiff and look after the details, that much, and he agreed to it.

He was the only one witness had anything to do with, in the selection of the board.

And the other four persons were Housman and Davis, his partner, Pierce their employee, and French, the joint promoter.

Mr. Henderson had never seen the mining property, did not know anything about it. He had never been to Alaska; he was acting merely at witness' request.

He had no financial interest in the company.

Pierce had never been to Alaska. He had never seen this mining property.

Housman had never been to Alaska. Davis had never been to Alaska.

Out of the five trustees the only one in the lot that had ever been to Alaska was French.

And the only one that knew anything about this property was French, and he claimed to know a great deal more than he did. He was one of the promoters that was sharing in this bonus deal.

(Witness was asked: "It has been stated here Mr. Rosene that that million and a quarter of common stock which you spoke of as the bonus going to the promoters, was issued, so far as appears on the books—to you—do you know anything about that," and he answered:)

"No sir."

That he never received it, never saw it. Did not know where he certificates were. That if counsel wanted his opinion as of where those certificates are, that is where they are, turned over to A. A. Housman & Co. but he didn't know. He had never had them in his possession;

(Witness was asked: "Was the question discussed with this Boston attorney during that time as to whether there was any way they could get this bonus stock in such a manner that there could not be a legal liability against all of them for it" and answered:)

As he had said before he was in there so few minutes off and on—any discussion—he remembered it was assured around that it was all right and legal and it was all right, financially it was a good thing to do and legally and anything like that—he didn't know anything about it, and for one he didn't think so; and he didn't today either.

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"No sir."

That he never received it, never saw it. Did not know where the certificates were. That if counsel wanted his opinion as of where those certificates are, that is where they are. turned over to A. A. Housman & Co. but he didn't know. He had never had them in his possession;

He had never, in person, transferred them, if they were issued in his name; but Mr. Henderson had a power of attorney from witness for the purpose of transferring such shares, and what he may have done witness didn't know.

If they were transferred in witness' name and transferred in witness' name to somebody Henderson was the only one that was authorized to do so, but witness didn't know anything about that. Witness never saw them and had nothing to do with them.

Personally witness had never voted this stock at any stockholders' meeting or issued any proxy to anybody else to vote it at any stockholders' meeting.

Didn't know whether this stock had been voted by Housman & Company at stockholders' meetings.

That he left New York after their transactions somewhere about the 22nd or 23d of March just as soon as possible to get away, even before they were finished—they were still working there.

The organization of the plaintiff company came up after he reached New York. They all took place in New York.

That he never conferred with the board of trustees of the defendant with regard to that organization.

It was impossible to do so, because up to the time Mr. Myers came out of the St. Regis witness did not have any idea of anything happening. After he came out and they commenced to send for McConnell they were going at what you might call a sixty rate speed, and witness did not know what might happen next, so he did not say anything to the directors of defendant, because there was nothing tangible to say, because he did not know what the next move would be from day to day, and it was only in the last few days he was there that the thing took place.

He was present in September, 1906, at the board of trustees' meeting of defendant when a resolution was passed authorizing him to make a subscription for \$125,000 in plaintiff company.

(Witness was asked what he did about it and answered:)

That he presumed it would be difficult to express that; in one sense what they authorized him to do he had already done without their authority; in the second place the only thing he did in compliance with it he explained that situation to Mr. Housman and Mr. Davis in Mr. Housman's office, and Mr. Henderson after witness came to New York, probably about two weeks after that meeting was held in Seattle.

He told—well Mr. Davis was fully aware of that situation, since he was here in that spring and he had gone to Europe for the purpose of telling Mr. Housman about it, so Mr. Housman was aware of it. Those two gentlemen themselves told me so.

Davis was president of plaintiff at that time. Housman was treasurer. Henderson was secretary.

The directors of plaintiff at that time were these three gentlemen and himself and Mr. Pierce; he didn't think French was a director at that time, he thought he had been relieved.

When he told them about this September resolution they simply said "That is all right. We have to cancel several more" and they did cancel several more, but it did not make any difference—"It is all right, John"—that is all they said.

At the time he had the talk in New York with Housman, Davis and Henderson, in the fall of 1906, \$125,000 had been paid to the plaintiff from the funds of the defendant, either by cash or by crediting the plaintiff on its account, but it had not been paid in any consideration of an indebtedness. It had not been paid as a consideration of an indebtedness exactly—more as an emergency.

That Henderson, Housman and Davis were at this meeting and that they composed the board of trustees together with himself and Pierce.

Davis, Housman, Henderson and himself were present.

(Witness was asked: "You four together with Pierce constituted the board" and answered:)

He was not sure but there was a man named McLaren that came into that board after he was away in the spring or while he was in Alaska in the summer—but he never met Mr. McLaren—never saw him; he was not present at that meeting but witness thought there was—.

That was the same Pierce that was an employee in Housman's office and whom he said was a director.

It was said and agreed and understood between witness and those gentlemen, that the \$125,000 would be accepted as a final—payment from the defendant, that there would be no more demands made—that it would square the account.

Mr. Davis died when witness was in Europe in 1910, he would be very close to Christmas, 1910.

Arthur A. Housman spoken of died two or three years prior to that. He would say it was in August, 1907, it might have been

in 1908, was not sure—one of those two years—one or the other.

Henderson died—it will be three or four years next Christmas.

CROSS EXAMINATION.

Q. (Mr. Gorham) Mr. Rosene, when you went to New York in the winter of 1905 and 1906, was it in December 1905 or in January or February, 1906, I did not quite understand you?

A. I left Arrowhead Hot Springs down in California on December 18th.

Q. And you arrived in New York when?

A. Well, we had a snowstorm coming up towards Washington and we stopped one day and we stopped in New Orleans one day, and so I would probably say it was very close to Christmas or the day after, but I think it was one day before.

Q. And had you at that time heard of these mining claims that are referred to in the minutes of the development company as conveyed to the development company for the issuance of the common stock?

A. I had not.

Q. You had not heard of them up to Christmas, 1905?

A. That is in detail so as to have any knowledge. Of the Kougark mining district as a whole, I have heard many things many times.

Q. This group of claims as a group seeking a market?

A. No, I had not.

Q. When did you first hear of this particular group?

A. Well, that is a difficult question.

Q. How soon after your arrived in New York?

A. I met Major French outside of the office of J. P. Morgan, one of the first days I was there and I had a conversation and he said something to me and, but whether he said mining claims or not I don't know. As far as I know I think the first knowledge I really had of it was about three weeks after Mr. Williams asked me to have French become a director, and I agreed to do so. I went to Mr. French's office in Union Square and he presented me with a bundle of documents covering the Kugarok company and half a dozen of other companies, that I read them all through, and that

was the first time I had anything—what you might call a knowledge of it.

Q. And what did those documents consist of?

A. Well, they were plans for the Kougarok company and the subsidiary companies and the railway company from Kougarok to Port Clarence, things of that kind.

Q. What things; what else was included in those documents that Major French handed you?

A. I am rather inclined to think the railway surveys and a survey of some alleged ditches and water rights and things like that; I am not sure about that.

Q. Those all refer to a railway claim—I am asking you when you first heard of these mining claims, so far as this group of mines is concerned.

A. At the time I mentioned.

Q. At that time?

A. Yes.

Q. What papers were there, if any, handed you by Mr. French that had reference to this group of 171 mining claims?

A. Well, that is too much of a question to ask what papers in a bundle about twice as large as that book—just what particular ones was in there. He sat back in his office four hours reading those things through, and which was which I don't remember now. It was ten years ago.

Q. You remember very well there was some plans for the railway, cannot you refresh your memory a little and say what other papers there were that had any relation to these mining claims?

A. There was a general plan that the Kougarok Company was going to put in the mining company and in the mining claims and a ditch company to carry the water, and the Kugarok Company was to own the railway from the Kugarok to Port Clarence and that was the general purport of those papers, which I said was no good.

Q. Was there any engineers' reports handed you by Major French with respect to the mining claims?

A. Not at that time.

Q. When, if at all?

A. About two weeks afterwards.

Q. That would be when; let us fix the time.

A. Somewhere in January, 1906.

Q. What did those engineers' reports consist of?

A. Fairy tales.

Q. And who were the engineers?

A. Isaac Copeland and Wilkinson and I don't remember his name—Alling.

Q. You believed those fairy tales at that time?

A. I am sorry to say I believed them later on. I did not believe them then, but after I had read them two or three times and listened to them two or three times, I became convinced that they were true.

Q. There was Copeland and who else?

A. Wilkinson.

Q. And who else?

A. Alling.

Q. Wilkinson, Copeland and Alling?

A. Yes.

Q. You made some investigation with reference to their standing as experts and men of character and integrity, didn't you?

A. I knew Mr. Wilkinson, and I telegraphed to some friends in San Francisco about Mr. Copeland and they said they knew him and had known him thirty years and considered him a good mining engineer and believed he was absolutely honest.

Q. And from the investigation which you made touching the character of those experts, you were satisfied to rely upon their statement at that time, were you not?

A. No, I was not satisfied. That mining business was rushed on me there just the same as if you were standing on a track and seen a train coming on at forty miles an hour.

Q. I am not now referring to the speed with which the company was organized.

A. The whole business.

Q. I am referring to your inquiry touching the integrity and character as experts of those engineers, and whose report upon those mines you say you read over three or four times?

A. Well, I will have to answer that question in detail so as not to be misunderstood.

Q. Answer it in detail.

A. The first time, before I knew Mr. Wilkinson, I had a conversation concerning him with Frederick W. Baker of London, and Mr. Baker said, "Well, John, Wilkinson is a man that we send first. If he makes a good report or a favorable report wherever we send him, then we always send a higher class, a better man, and if he makes a bad report, then we are satisfied to leave it alone." So that I would call him an engineer in that class, which you can better describe than me. The only knowledge I have of Copeland was that in a conversation I found that he was supposed to be known with those friends of mine in San Francisco, and so I sent this telegram and got the answer. Alling I did not know anything about and I never heard of him.

Q. Did you make some inquiry as to Alling?

A. At a later time—probably at that time, I don't remember. Mr. McConnell was there and French was there and they were all anxious to get that \$245,000 and they were pouring words at you like water, and just what was said at that time in reference to that I don't know. I don't remember those things.

Q. And when you had read those reports from the mining engineers, you agreed to consider the project of organizing a corporation to take over those mining properties if the engineers were ascertained by you to be reliable, were you not?

A. I doubt if that would be a correct construction of it; but anyway after I had read those mining engineers' reports and the statements, the blueprints and the thing that was there, it was a question in my mind if I had been correct when I declined to have anything to do with it. That perhaps there was a reason—

Q. You say you declined to have anything to do with it?

A. Yes, I had refused three times to have anything to do with it.

Q. Did you submit those reports to any other parties for their consideration before this organization?

A. Yes.

Q. To whom did you submit them?

A. Well, the principal ones where I left them and asked them to look them over and where I believe they did look them over was

Haldron & Company. I submitted them to Mr. Frederick Baker also. He had them perhaps the longest of any of them.

Q. And you were satisfied after the investigation as to the character and ability of those mining engineers and the reports you have received in reference to them—you were satisfied with the statements contained in those reports?

A. No, I was not. I was satisfied we were going too fast, and I said so. I was satisfied it was a good thing for the Northwestern Commercial Company to buy that railway, and that was the only thing I was satisfied about. The other things came where you are a minority in a crowd of friends and they are anxious to do something.

Q. You have testified concerning these reports before, haven't you, Mr. Rosine, in a suit by L. H. French against the development company?

A. Yes, I have.

Q. Your deposition was taken in New York, was it not?

A. There was no deposition I don't think. You people kept me down there for months and months, and you would not be in existence now if I had not gone there.

Q. Do you mean to say there was no deposition in the suit of Leigh H. French, plaintiff against Northwestern Development Company, pending in the Supreme Judicial Court, of the County of Cumberland, State of Maine?

A. I beg your pardon, Mr. Gorham—well, my answers there were verbal so that I did not regard it in the light you mean.

Q. They were written down, were they not?

A. I think they had all to be taken down to be sent to Portland.

Q. You know what a deposition is?

A. Yes.

Q. When I asked you if your deposition was taken, did you mean yes or no?

A. The transaction in New York was like it is here; I was asked questions. I had forgotten that they were written down to be sent away.

Q. Were you sworn to those answers?

A. I believe so, yes.

Q. And you understood at the time that you were being examined as a witness in that case, didn't you.

A. Yes.

Q. Counsel for the respective parties were present and examined you, direct and cross, didn't they?

A. Well, they were present one time and the other.

Q. Both counsel examined you, didn't they?

A. I believe so.

Q. And after you got through with your testimony, it was written out and you subscribed to it, didn't you?

A. If I was asked to, yes.

Q. And you then swore to the truthfulness of it, didn't you?

A. Yes, I expect so.

Q. T. A. Davies, the president of the development company, was present during all that time, wasn't he?

A. He was in Europe.

Q. He was not present when you gave this deposition?

A. Well, when you say he was there all the time, I know he made a trip to Europe and I stayed on there fixing up this testimony. I didn't know whether he was present.

Q. What fixing did you do with the testimony—how did you fix the testimony?

A. I don't understand what you mean.

Q. I am trying to find out what you mean by the language that you just used—you said you fixed up this testimony; what do you mean by fixing it?

A. Well, if I said that I don't know it.

Q. That was what you said.

A. Well, I don't know that—I don't know myself what that would mean.

Q. And you say that Mr. Davies was not present?

A. Mr. Davies was present while I was in New York, both before he went to Europe and after he came back.

Q. I am trying to find out whether he was present and heard your testimony.

A. You said all of it.

Q. All your testimony as given at that deposition.

A. I don't believe he was.

Q. You don't know?

A. No.

Q. You would not say that he was not, would you?

A. I don't believe he was—that is good enough for me.

Q. I show you a paper which I will ask to have marked for identification as exhibit GG, and I will ask you whether that is your signature at the end of page 175 (showing)?

A. I think it is, yes.

Q. Now, after you got those mining engineers reports—or was it after you got those reports that you interested Mr. Housman or before you got those reports?

A. I did not interest Mr. Housman. Mr. Housman interested himself in the manner I have already explained.

Q. He interested himself?

A. Yes.

Q. And then he interested Myers of London and Fisher of Dundee?

A. Yes.

Q. And Farquhar?

A. Yes.

Q. Where was Farquhar?

A. New York, although he is a gentleman more engaged in building railroads in Brazil than anything else.

Q. Do you remember of testifying at the hearing in the suit of French versus Northwestern Development Company, in the deposition I have referred to—you remember testifying?

A. Yes.

Q. And I will ask you if you stated during that deposition that you transferred these properties for \$245,000 cash and the full issue of the capital stock, three million and three quarters?

A. I have already answered that question in my previous testimony.

Q. And you further testified at that New York deposition that you delivered to the treasurer two and a half million of that common stock?

A. Well, but not in the sense that I did so myself, personally.

Q. You caused it to be so done—it was in your name?

A. Well, that has all been explained. I had nothing to do with it. The stock was printed after I left New York. I never saw any of it. I could not say that I caused it to be done—but it was done by Housman and Henderson and those gentlemen, but I gave Mr. Henderson a power of attorney for such purpose.

Q. For that purpose?

A. Yes.

Q. So that you caused it to be done?

A. In that sense, yes.

Q. And you caused him to deposit with A. A. Housman & Company, besides the two million and a half of common stock for delivery to the preferred subscribers—you caused a million and a quarter of the common stock to be deposited with A. A. Housman & Company, didn't you?

A. Probably in the same manner, yes, sir.

Q. And you knew that it was there, didn't you?

A. I did not know, but I assume it was.

Q. You didn't know?

A. I didn't know.

Q. You know how that million and a quarter was split up in certificates?

A. I did not.

Q. Do you know what your interest was in it?

A. No, I don't think I could say definitely. I believe, approximately, forty per cent of the total. I don't remember. There was a memorandum that Mr. Housman prepared and that I had typewritten and signed and that covers it.

Q. You signed a memorandum?

A. That is my impression; that was done before I left New York.

Q. So that you were a party to the depositing of this million and a quarter of the common stock that was to be divided up between you and French and Housman, is that right?

A. Well, I don't know. I presume I was. There was no dispute over it. It was well understood it was going to be done and I think probably that agreement will explain it more than I can, and that was another hurry-up transaction in the last hour.

Q. But you were well aware before you left New York that you had an interest of five hundred thousand shares out of the million and a quarter in that common stock which was deposited with A. A. Housman & Company?

A. If that was the interest specified in the agreement, I was aware of it.

Q. And you were well aware that Mr. Housman had four hundred thousand shares?

A. If that was the interest specified.

Q. And that French had three hundred and fifty thousand shares?

A. Yes. Well, that would make up the total.

Q. Now, refresh your recollection, Mr. Rosine and tell us whether or not it was not agreed between you and Mr. Housman and French, and definitely agreed, that that should be the way in which this million and a quarter bonus stock was to be split up between you as promoters?

A. The definite agreement was specified in the agreement that I refer to.

Q. We have not the agreement now.

A. Well, you did have it.

Q. No, the development company has not got it.

A. I have seen it in the possession of the development company in New York.

Q. We have not got it.

A. I know you have it—that is, the development company.

Q. That is, you saw it in the possession of A. A. Housman & Company?

A. No, I saw it at the time of the trial you refer to.

Q. The trial in New York?

A. Yes.

Q. The taking of the deposition?

A. Yes.

Q. You mean that it was temporarily in the possession of the attorney for the development company at that time?

A. Yes.

Q. I am asking you as to whether there was any restriction placed upon that deposit with A. A. Housman & Company of that one million two hundred and fifty thousand shares of the common stock?

A. What do you mean by restrictions?

Q. What was it deposited with A. A. Housman & Company for; why was it deposited with them—why not split it up and issue it to the several parties interested in it?

A. I don't think that would come under the head of "restrictions". There was objection—I objected to it all the time. I did not want to have anything to do with it, because I thought it was a mistake to do that. I have refused from that time to this to have anything to do with it because I did not think it was the right way to do it, but beyond that there was no restrictions. I don't know—the stock was not printed when I left New York, and not probably for some days afterwards. I remember having letters from Housman in which he told me that the office was working night and day and fixing up the stock certificates; but that was after I came out here. I don't remember whether there was anything that would come under the head of restrictions excepting that as far as I was concerned, I did not want it.

Q. The transfer books which have been introduced in evidence show the original issue of the common stock, and show it in one certificate, or show it in eight or nine certificates for the directors and signers of the articles of incorporation, and the balance of the common stock, some three million seven hundred and forty-nine thousand and some odd dollars, was issued in one certificate to John Rosene; that certificate was surrendered and two certificates—one certificate was in the sum of two hundred and fifty thousand dollars in A. A. Housman & Company's name for the benefit of the subscribers to the preferred stock—no I am mistaken in regard to that—the original certificate was seven hundred and forty-nine thousand, nine hundred and eighty-nine shares in Rosine's name, that, together with the eleven shares to the incorporators made the seven hundred and fifty thousand shares of common stock, which at five

dollars a share would make three million and three quarters. Now, that certificate issued to John Rosine for seven hundred and forty-nine thousand odd shares was an original issue and it was split up so that A. A. Housman & Company, for the benefit of the subscribers to the preferred shares, got five hundred thousand, which would be two million and a half dollars, and John Rosine got the balance in three or four certificates—three certificates, I think, aggregating—

MR. GRAVES: Your testimony is quite extensive, Mr. Gorham.

Q. (Mr. Gorham)—then the certificate for seven hundred forty-nine thousand odd shares was split up so that John Rosine got three certificates of one hundred thousand, eighty thousand and seventy-five thousand, and Housman & Company got four hundred and ninety-nine thousand, nine hundred and eighty-nine?

THE WITNESS: Are there any dates to those transfers?

MR. GORHAM: April 2nd.

THE WITNESS: Well, I was in San Francisco at that time and I could have no more to do with it than you.

Q. Why did they have to work night and day to issue a dozen certificates—that is what I am getting at?

A. If Mr. Hartman was here and could produce the letter from A. A. Housman & Company with that statement in it, and that probably gives the reasons, but I don't remember.

Q. But that was not referring to this dozen certificates?

A. Those details I don't know the first thing about. I never paid any attention to them and I never had any knowledge of them.

Q. You never had any knowledge of the certificates for a million and a quarter in your name that was deposited with Housman & Company in trust for the promoters, consisting of Rosine, Housman and French—you now say you did not have any knowledge of that?

A. No; that probably is putting it too strong, because when I came back the next fall and the following year I may have been told of such a thing.

Q. Didn't you have any knowledge of it before you left San Francisco?

A. How should I know what they did before it was printed?

Q. Didn't you have knowledge that that was to be the method?

A. I had that understanding—not the knowledge.

Q. That understanding—that agreement?

A. Well, I had that understanding—agreement if you like, but I could not know anything about something that had not taken place.

Q. Didn't you write a letter to Housman & Company when you deposited that stock, requesting them to hold that stock, all of it, for you—that bonus stock?

A. If there is such a letter, it will speak for itself, I don't remember.

Q. You don't remember?

A. No.

Q. Did you so testify at this hearing in New York?

A. I might have—if there is such a letter.

Q. And if you did, is it true?

A. If there was such a letter and it was before me in New York, it would have been true, yes. I don't say that I didn't write such a letter. I don't remember it.

Q. But you are very emphatic, you say you do not know anything about the bonus stock coming to you.

A. I never said that. I said I did not want it to come to me.

Q. But you accepted it just the same.

A. I did not—I never accepted it—I never saw it.

Q. You authorized its acceptance?

A. Well, if it complied with the wishes of friends I may have done that in a Pickwickian sense, but not in an actual sense.

Q. And this letter which you addressed to Housman & Company, directing them to hold the million and a quarter of stock that was to be split up between the promoters, was that in a Pickwickian sense when you requested them to hold it for a year?

A. If there is such a letter, Mr. Housman prepared it and had me write it—I only complied with their wishes in the matter—like the other papers.

Q. Is that all?

A. Yes.

Q. There was some dispute between you and French, was there not?

A. No.

Q. In that year?

A. No.

Q. No dispute at all?

A. No.

Q. No dispute in reference to this stock?

A. What year?

Q. 1906, in reference to this bonus stock, this promoters' bonus stock?

A. I don't believe there was, Mr. Gorham. I don't think so but I would not be sure—I don't see how there could be any such dispute.

Q. I will ask you if you testified at that hearing in New York to this effect, that the method of procedure concerning the issuance of stock to me for the mining property was suggested by the attorneys and agreeable to all concerned?

A. I beg your pardon, I didn't get that.

Q. Did you testify at that hearing in New York that I have referred to, to this effect: That the method of procedure concerning the issuance of the stock to you for the mining properties, that is three and three-quarter million, was suggested by the attorneys and agreeable to all concerned?

A. Well, I don't see any difference in that from what I said, because since I acquiesced in it, it was agreeable to me, I presume, and it certainly was agreeable to the rest.

Q. Well, answer my question.

A. I don't remember the testimony. You had me there for a specific purpose, you remember, and it is not very fair to bring such a thing in this case here. I was there to defend your company's very existence against a very bad attack. You framed the answers and I answered them as true as possible; and to bring that up here is small business.

Q. You did what—let me hear that answer.

(Whereupon the stenographer repeats the answer of the witness.)

Q. You refer to me personally, that I framed those answers?

A. No, sir; I refer to the Northwestern Development Company.

Q. I was not present?

A. No, sir.

Q. I was not attorney for the company at that time, was I?

A. That I don't know.

Q. But you say that you submitted to allowing the attorney for the development company to frame your answers at the taking of this deposition and that they were as truthful as you could make them under the circumstances; is that what I understand you to say at this hearing now?

A. Well, I don't know that I said that, but what I mean to convey is this, that here you are dealing with a large scope of matter, and they had testimony there, or rather the complaint of Mr. French, that was pretty large and used all formal language. The only one that was able to defend your company so that French would not take possession of all you had, was me, because I was the only one that had knowledge of it. Now there was half a dozen ways that you could have answered any one of the questions and still stick to the truth, and the purpose there was to defeat French, because he was wrong.

Q. He was wrong?

A. There was no question about it. There was the purpose—to tell the truth, but to tell the truth in such a manner as to produce the desired effect, and now you are bringing it up here where you are dealing with an opposite question altogether, and trying to pin me down. I never answered anything in my life that was not true and I will not for money or anything else.

Q. I have not intimated that yet; I am trying to reconcile what you say now with what you said then, and we will let the jury determine whether it is reconcilable or not.

A. All right. I had my say.

Q. Then you do not mean to say now that your answers at that time contain any element of untruth, do you?

A. Not so far as I know, no.

Q. Didn't you state at that hearing as follows, in answer to the question:

“Q. 281. As a matter of fact, Mr. Rosine, under this agreement did you not get five hundred thousand dollars worth of stock, Mr. Housman four hundred thousand dollars worth of stock and Major French only three hundred and fifty thousand dollars worth of stock for the good will of the proposition of Major French aside from the fact that Mr. Housman was to act as fiscal agent for one year free and was to loan the company fifty thousand dollars?”

Didn't you testify at that hearing in answer to that question, as follows:

"A. No, those statements are wholly incorrect. The stock I received was in payment of the mining properties and not for any good will and Mr. Housman did not loan any money to the company."

A. I don't remember; the testimony will speak for itself.

Q. And was it true, if you so testified?

A. Mr. Housman did not loan any money to the company; he loaned fifty thousand dollars to me for the purpose of organizing the company.

Q. Was it true if you so testified, that the stock which you received was in payment of the mining properties?

A. You are trying to put one construction to suit this purpose here and they were trying to put another construction to suit their purpose there.

Q. Well, was it true?

A. I don't remember anything about the testimony.

Q. Well, was it true?

A. Which?

Q. That statement, that the stock you received was in payment of the mining properties?

A. After the transaction first took place where the lawyers made up all those papers that I have never seen, where Mr. McConnell transferred those things, these claims to me and then afterwards I immediately transferred them to the company and after I had gone away, a week or so afterwards, they issued this stock and that was transferred and handled in my name in my absence, if that is the correct transaction, that would be true.

Q. You knew you were receiving this stock in payment of the mining properties?

A. I knew there was such a transaction going on. I don't know whether I received it—I never did receive it—I never had anything to do with it—I never saw it.

Q. Didn't you testify at that hearing that you believed that the preferred stock was worth par?

A. I don't remember any such testimony, but that might have been and it might not, I don't know.

Q. Was it true, if you so testified?

A. Which?

Q. That you did believe that the stock at that time was worth par?

A. At what time?

Q. The preferred stock?

A. At what time?

MR. BOGLE: I object to that statement; he said he did not

know whether he made it and the question if he made it is it true and if he believed such and such a thing.

MR. GRAVES: Why don't you let the witness see it?

MR. GORHAM: You can let him see it when you come to your examination, Mr. Graves.

(Question repeated to the witness.)

THE COURT: Let him proceed. Note an exception.

Q. (Mr. Gorham.) At the time of the organization of this company, and after the conveyance of these mining properties to the company for the common stock.

A. Well, if I believed the stock would be worth par? If it had been paid in cash and used for the purpose intended, that is buying the railway and buying these mines, as far as the preferred stock is concerned, yes, I undoubtedly believed it or otherwise it would have been a stupid transaction to engage in.

Q. You were one of the chief promoters of this entire scheme?

A. I was not. I was the very tail end of it and I am sorry to say I found that was too much.

Q. Did you consider you were a mere figurehead?

A. Worse than that.

Q. And didn't you—

A. (Interrupting) I was buncoed, if you want to know.

Q. And didn't you testify at that hearing in New York that I have referred to, that you would not consider that you had acted as a figurehead.

A. Well, I have answered the question—they were framing questions—I don't remember.

Q. You don't remember?

A. I don't remember.

Q. If you did so testify at that hearing, was it true then?

A. I don't think so. That would have been a mistake.

Q. It would have been a mistake?

A. A mistake.

Q. Didn't you testify that you believed that the project, this project involved in this organization of this development company, would become a great success?

A. I believed that from the time we were organized and up to August, 1906, when I began to find out that we had been swindled.

Q. You believed it up to that time, that it had become a good financial success?

A. I don't know anything about "great," but a success.

Q. Didn't you testify at that hearing that you believed that it would become a great success?

A. I don't remember.

Q. And if you so testified, was it true then?

A. I have already answered. I don't see the application of the "great."

Q. Was it true or not?

A. I believe it was true that I believed it to be a success, yes.

Q. Did you testify you believed it would be a great success?

A. I don't remember.

Q. If you did so testify, was it true at the time?

A. I don't remember that even.

Q. That is not a question of memory, that is a question of fact.

A. Well, when you want to draw the distinction between "great" and—

Q. Didn't you testify at that hearing that, according to those mining engineers' reports in which you had confidence, there was not less than fifty million dollars in gold locked up there in the frozen ground in those mining claims which you conveyed?

A. Well, that was the purport of the report, showing such a state of affairs to exist, but it did not exist.

Q. It did not exist, it was determined afterwards?

A. Yes.

Q. But you believed it at that time didn't you?

A. Well, I was better than half persuaded to believe it. I was doubtful, but still there was evidence of competent engineers, reliable engineers making the statement. They had blue prints and things to show for it. I believed it, yes, I thought so.

Q. How is that?

A. I believed it at the time, yes.

Q. And it was upon the faith and credit of that statement in those engineers' reports that there was fifty million dollars of gold locked up in those mining claims that this whole organization was launched?

A. I don't think so, because there was an engineer named Holden called into Mr. Housman's office and he turned cold water on it and he said it was not a good report and we should not have anything to do with it, but those fellows concluded to go ahead.

Q. You did not act on his report, did you.

A. No, it seems not.

(Whereupon a recess is taken until 1:30 p. m.)

November 30, 1915, afternoon session 1:30 o'clock P. M.
continuation of proceedings pursuant to recess, all parties present as at former hearing, names of jurors called, all present.

JOHN ROSINE, same witness, resumes the stand for

FURTHER CROSS EXAMINATION,

Q. (Mr. Gorham) Mr. Rosine, was there a prospectus issued on behalf of the development company prior to the organization?

A. No, I think it was done after the organization, shortly afterwards, because they balled it up pretty handsomely after I left New York.

Q. How?

A. They balled it up pretty handsomely after I left New York.

Q. It was issued after you left?

A. Oh, yes.

Q. You never saw the prospectus?

A. Afterwards, yes.

Q. You saw it afterwards?

A. Yes.

Q. You never issued it?

A. Oh, no, no.

Q. And whose name was signed to it when it was issued?

A. I wrote a little memorandum and signed my name to it before I left, just three or four paragraphhs, and then the clever Major French stuck it on behind there so that to me it looked like I wrote the whole thing.

Q. Then you signed something before you left New York?

A. I signed a memorandum record.

Q. What was the contents of that memorandum?

A. I believe it all related to the Kugarok in a general way, I don't remember though.

Q. Was it not a prospectus setting forth the plan of organization of this development company?

A. I believe that was in the prospectus, but I had nothing to do with writing that. They made a fudge there, like they did with several other things—by putting my name in such a form as if to indicate that I had done it when I had nothing to do with it except writing certain parts. If you have the prospectus I will show you what I wrote.

Q. At this hearing in March in New York, the hearing of Leigh H. French against the development company, were you shown a copy of that prospectus, or the original at the time you were on the witness stand?

A. I don't remeber, I could not say.

Q. I will ask you if at that time this question was propounded to you and this answer given by you:

“Q 16. I now show you a prospectus entitled ‘Northwestern Development Company’ and ask you to have same marked for identification. Show whether or not you signed this prospectus, dated New York, March 8th, 1906, as authority for having same printed. A. I signed the last page.”

Is that right?

A. You will pardon me, Mr. Gorham, I am very sick or you would not have any fun of that kind, but what I said now was of the same kind. I signed the part that I wrote myself before it was printed. After I had left New York they took advantage of my absence so as to make it appear that I was the author of that whole prospectus. That was not true.

Q. Was this your statement?

A. I don’t remember that. If you will notice it—

Q. This is question 16 and your answer to it.

A. If I would look at that I could not remember it.

Q. You would not know any more about it?

A. No.

Q. Was that true at the time you so testified, if you so testified?

A. Which was true?

Q. The answer which you made to that question.

A. I don’t remember the answer.

Q. “I signed the last page.”

A. Yes, sir, but that could be misconstrued so that it would not be the truth.

Q. Was this question at that time and place propounded to you and did you give this answer:

“Q 17. State whether a proof of this prospectus was ever submitted to you and if so whether or not you initialed each page thereof as O. K. before same was printed? A. I don’t remember; probably it was.”

Did you so testify at that time and place?

A. I don’t know.

Q. And if you did so testify, was it true?

A. Well, that is neither negtaive nor affirmative and I don’t see where it changes it any.

Q. Answer my question.

A. I don’t see where there is any answer to that.

Q. No answer?

A. No.

Q. You haven’t any answer?

A. No, not to that. It seems to me I can’t answer it.

Q. You understood it sufficiently well to answer the question?

A. I will tell you, I had ptomaine poisoning last night. I was very sick and I asked Judge Bogle not to come down today. I could do easily with you last week but I am suffering too much. You were trying to collect a million dollars there or to prevent paying a million dollars at that time, and now you are trying to collect one hundred and twenty-five thousand dollars—two opposite facts.

Q. You admitted the French claim was not a legitimate claim?

A. You could not defeat it, though, without me—he would have made it legitimate.

Q. Did't you testify at that time and place, in response to question number 40, which is as follows:

“Q 40. I now refer you to pages 20, 27, 28, 29, 30 and 31 of the report already marked for identification and to page 5 of the prospectus already marked for identification and to the matter contained under the following sub-heading: ‘Mr. Mark M. Alling, mining engineer, of Stockton, California reports as follows.’ I ask you to examine the matters in the prospectus under the heading referred to and if you find that it is an absolute extract from the reports already marked for identification, and if you find that the report of Isaac Copeland on page 4 of said prospectus is an absolute extract from the said report and if you find that pages 6 and 7 of said prospectus entitled ‘Mr. E. M. Wilkinson, civil engineer of San Francisco reports as follows:’ is an exact extract from the reports already referred to and continued particularly on pages 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44. Will you please explain your answer to question 365 given in your deposition taken January 26th, 1910 which question is as follows:

‘Were you the person who originally formulated and presented to Major French the project of the Northwestern Development Company? A. I was the person who originally presented it to him’.”

That is the end of the question and this is the answer:

“A. The prospectus states for itself that it is an extract from the reports of those mining engineers and in the answer to the question you refer to, I did not mean to convey the impression that it was I who had formulated the mining part or the mining operations of the Northwestern Development Company. What I meant was that it was I who came to Major French with the proposal of the organization of the Northwestern Development Company and that he did not know anything about the organization of that company, excepting from me, when I spoke to him about arrangements made with Mr. Houseman.”

Did you so testify in answer to that question. Answer yes or no, please and then explain afterwards.

A. I presume I did, because if it is explained, the real facts, namely of the change from French's Kugarok Company to Houseman's Northwestern Development Company, French did not know anything about that development company until after the arrival of Mr. Myers from London, and those discussions and the gentleman from Boston had come down and was told, but of course the scheme, as far as the mining claims and figuring on the railway, only he wanted the Kugarok—he had been at that for more than a year before I knew anything about it.

Q. Were you not asked this question at that time and place:

“Q. 158. Had you ever heard of these particular propositions made in the prospectus of your company before you met Major French?”

And did you not answer it as follows:

“A. As far as the mining properties were concerned, I had heard of them in a general way as it was common report that the Major was trying to promote them.”

As that answer reads, did you so testify?

A. I told you I met him in front of J. P. Morgan's and he gave me some idea of that as soon as I arrived in New York, but that was not detailed knowledge of any of the matters.

Q. Didn't you testify at that time and place on that occasion, in response to the following question and give the following answer. I shall read them:

“Q. 196. Is it not a fact that at the time that you paid this twenty or twenty-five thousand dollars that Major French stated to you that now that you had made a payment to him for the promotion work of this company, that you were to consider that all of these mining claims, surveys, reports, location notices, water rights and all of the other things which comprised his whole proposition were now subject to the order of the Board of Directors as soon as the company was incorporated, and that he desired that the corporation be completed as soon as possible, or in substance that? A. No, that is not correct. Major French did not make such a statement. The proposition on which I agreed to go into the project was that the Port Clarence part of the project would be eliminated and that I would have nothing to do with any of the properties except those that had been reported on by Copeland, Alling and Ashford.”

Was that question put to you and did you make that answer?

A. I don't remember.

Q. Was it true, if you made it?

A. Approximately, yes.

Q. Were you asked this question and did you make this answer:

“Q. 214. At these various meetings, held before and after

the incorporation of the company, was it not generally understood and agreed between the parties at the meetings and was it not fixed as to whom should be the officers? A. The selection of officers of the company was entirely left to me and was made by me personally with the exception of one officer, that is the first vice-president; I think it was one Kenneth K. McLaren. His election was selected by Mr. Myers and Mr. Farquhar. But generally speaking the list of officers was left to me."

Did you make that response to that question at that time and place?

A. Mr. Feiner made those questions for me.

Q. Did you answer that question as I have read it?

A. Surely, to protect and cover Mr. Houseman.

Q. Was it true at the time you made that answer?

A. In an indirect form, yes, sir.

Q. What part of it was untrue?

A. If Mr. Houseman would not have agreed to be a director, I could not select him any more than if I would not agree to he could not select me. That thing was done, as I explained to you, in a hurry.

Q. "The selection of officers of the company was entirely left to me," is that true?

A. In an indirect sense, yes—not in the way you are trying to make it appear.

Q. Did you intend to deceive the Court in this proceeding by an answer which had an equivocal meaning?

A. No, we intended to shoot at the mark, and instead of your shooting at the mark, you shoot—instead of your shooting at the mark you shoot from it—we tried to shoot the mark. Mr. Feiner prepared the bullets and I did the shooting. We stuck within the truth all right.

Q. I show you a paper which I will ask to have marked as exhibit HH for identification and I will ask you to read that (showing).

A. Yes, I can read that for you (reading).

"Mch. 2nd. 6.

Major L. H. French,

31 Union Square, N. Y. City.

Dear Sir:

This is to confirm verbal arrangements as follows:

1. That out of the \$245,000 cash due to me from the Northwestern Development Company I shall pay you the sum of \$31,000, to reimburse you for moneys expended by you on that Company's mining properties.

2. That out of the allotment of \$1,250,000 par value of

the Northwestern Development Co's stock I shall transfer to you \$350,000 par value for past and future services; the condition of this part of the agreement being that the entire block of \$1,250,000 par value for this common stock so allotted to me shall be on deposit with A. A. Housman & Co. for a period of one year from this date. Yours very truly,

Accepted:

(Sgd) J. R."

Q. Is that the letter—was that letter addressed to Major L. H. French, signed by you of that date and delivered to him?

A. I don't know.

Q. You don't know?

A. You can serve that as an alleged copy.

Q. That is simply a copy.

A. Somebody made that, I did not make it.

Q. Do you recognize the contents of the letter, that is what I want to know?

A. I don't recognize anything about this \$31,000. I could not answer that question. The rest of it about the \$350,000 of that common stock, you have already got introduced here as being the fact and I don't know, but I think it is probably correct—does that make up the \$1,250,000?

Q. You think that is a true copy of the letter?

A. I don't know anything about it—I don't think anything about it.

Q. I will ask you, Mr. Rosine, if at the hearing of the taking of your deposition in the suit of French vs. the Northwestern Development Company, which I have heretofore referred to, at New York on the 26th day of January, you were asked this question:

"Q. I show you a copy of a letter which has been marked 'Defendant's Exhibit Number 1' Adeline Sessions Notary Public, January 26, 1910, and I will ask you whether that is a copy of a letter which you wrote to Major French reciting in part your arrangements with him to which you have already testified?"

To which you responded:

"A. It is.

Was there such a copy of the letter submitted to you and did you make such answer?

A. I don't remember anything about it.

Q. I will ask you if this question was put to you and the response made by you at that time and place, January 26, 1910, as follows:

"Q. Will you read that letter. A. (Reading) 'March 2nd, 6. Major L. H. French, 31 Union Square, N. Y. City. Dear Sir. This is to confirm verbal arrangements as follows: 1.

That out of the \$245,000 cash due to me from the Northwestern Development Company I will pay you the sum of \$31,000 to reimburse you for moneys expended by you on that company's mining property. 2. That out of the allotment of \$1,250,000 par value of the Northwestern Development Company's stock, I shall transfer to you \$350,000 par value for past and future services. The condition of this part of the agreement being that the entire block of \$1,250,000 par value of this common stock so allotted to me shall be on deposit with Houseman & Company for the period of one year from this date. Accepted. Yours truly, J. R.' "

Did you make such response to that question?

A. I don't remember.

Q. If you did, was it true?

A. Since I don't remember whether I made it, I can't answer that question. Most of the things are in there just as in accordance with the recollection as I remember the transaction, only I don't remember anything about the thirty-one thousand dollars, but I do remember that French had some of those notes that McConnell got, and had some drafts that he collected through Housman & Company. Your books will show.

Q. Is there anything in here that is not true?

A. I don't know anything about the thirty-one thousand dollars. I don't know whether it is true or not.

Q. Were you asked this question at the taking of your deposition in the French suit above referred to on March 8, 1910:

"Q. 232. Did you consider this a personal agreement between you three, in which the company had no part?"

And did you make this response thereto:

"A. I did consider it a personal agreement between us three in which the company had no part, except that it was known that I was to receive the stock from the company in payment of these mining properties and it was well known by all of us three what each one's proportion of that stock was to be."

Was that question put to you and did you make that answer in response thereto?

A. I don't remember again.

Q. If it was, was it true?

A. Yes, on the basis that you remember that this payment on mining property stock was a fictitious transaction by legal lights, which I was only a medium to confirm. In its real sense, the only thing we paid for the mining property was \$245,000—no more and no less—and the shares that were issued in this manner, that is the suggestion of the lawyers, was not issued in payment of the mining properties, because I thought it was issued all together for the whole

purpose. It shows for itself in the way the stock was handled, and so I don't see where it is necessary for me to explain it. It is quite evident what took place.

Q. And were you asked at that time and place, March 8, 1910, as the witness, the following question, and did you make the following answer thereto:

"Q. 283. Will you explain why it was that you who were acting merely as a figure head in the transaction and by this I do not wish to question the value of your connection with the company as far as its future prospects were concerned, but how you got more stock than either Mr. Housman, who was to loan the company fifty thousand dollars and act as fiscal agent for one year and one hundred and fifty thousand dollars more of stock than Major French who was the Father of the enterprise? A. In the first place, seeing that I secured the first \$300,000 of the Company's capital, I would not consider that I acted as a figure head, and in the second place, in order to carry out all the plans of the project, it became necessary to incorporate the Seward Peninsula Railroad Co. and I had to ask my associates in Seattle, namely, Mr. Trenholme and Mr. Williams and Mr. Perkins to become officers of that Company, and furthermore, Mr. Trenholme became the assistant treasurer of the Northwestern Development Co. and the actual disbursing officer for that Company at Seattle. Mr. Williams became the President and Col. Perkins the Secretary of the Seward Peninsula Railroad Co. and all three of these gentlemen rendered valuable services and did very much work for the Northwestern Development Co. for a period of about two years, for which they received no compensation whatsoever, but I expected to compensate them for these services by giving them a portion of my shares and I did not expect to retain over \$250,000 par value of these shares myself, and therefore, I would actually receive the smallest part of this common stock as between Major French, Mr. Housman and myself."

Was that question propounded to you and did you make that answer at that time and place?

A. Well, since I can't remember the short ones, why that would be too long, but the general trend of the story in there is approximately correct, and I have no doubt Mr. Feiner prepared such a question and answer, something like that, or nearly like that.

Q. Referring to the common stock, were you asked this question:

"Q. 288. Was not the stock worth par at that time?" And didn't you make this answer:

"A. It was believed to be worth it, but it was not."

A. Well, now, that is one of those questions, Mr. Gorham

which can be misconstrued. I don't know whether I made such an answer or not; but you can put it that way—the stock was not printed; nothing was selling. We had a program before us waiting, and my opinion of that program was that it didn't amount to very much, but when you say, "How much did I believe that each one of those five hundred thousand shares was worth," I don't think I ever gave that a thought.

Q. You remember about that stock being pooled for one year, since I read those questions and answers?

A. I remember what you read, but I don't remember anything about it, but I have an idea that is correct, because I made objection first to the transaction, and afterwards I received it.

Q. You remember this letter was written by you to French March 2nd, 1906?

A. I don't remember anything of the kind.

Q. Well, when was the letter written?

A. I don't know that it was ever written—I have no such recollection.

Q. But you have testified this morning that there was such a letter, and asked me to produce it.

A. Will you show me that testimony of mine.

Q. It is in here.

A. I don't remember that. I don't think it is correct. We are of a different opinion there, but you showed me a copy of a letter that I did not know anything about, but the facts in the letter are approximately correct, excepting the thirty-one thousand dollars, and that might also be correct—I don't know. You have my papers to show whether it is correct or not—if you give them to me I can answer your question.

Q. How have I got your papers?

A. Your company has my checks, the notes which you borrowed six years ago; if you give them to me I can answer.

Q. They went in as exhibits in this deposition?

A. Probably you got them for that purpose anyway.

Q. Now, did you pay any part of this \$245,000 to McConnell for this mining property, and, if so how much?

A. What took place in New York with that \$125,000. I don't remember now, Mr. Gorham, exactly. It is pretty hard to go back to that. French was the one, in a general sense, that received it, but then McConnell and he watched one another. I know that after I came here from San Francisco Mr. McConnell came here and presented me with one or two of those notes before they were due, and I gave him my individual checks in payment thereof, and I loaned you the checks.

Q. Tell me what was the first payment made to French on this transaction by you?

A. Twenty thousand dollars, I think.

Q. When was that made?

A. Well, that was when I swallowed the first bait—I should think it was somewhere about the first of February, but I am not sure about that.

Q. And when did you make the next payment?

A. To whom?

Q. To French or McConnell, or when did you make the next payment for this property to whoever owned it?

A. Some money was paid in New York, that was before I left there; that would be, approximately somewhere between the 10th and the 25th of March, although it might be a day off, too.

Q. How much?

A. I think I told you I didn't remember. The checks will show. You have them. You borrowed them and if you return my property I can answer your questions.

Q. You mean me, personally?

A. I mean your company.

Q. You don't mean that I am the person—I want the jury to understand that—did you pay McConnell your individual check on March 15th for \$93,000 on account of that transaction?

A. If there is such a check in existence, undoubtedly I did.

Q. Don't you remember?

A. I don't remember even the date or the amount.

Q. That would not impress itself on your mind, an account of that size?

A. That was not very much of an amount. I had dealings with larger figures every day, I am sorry to say, and that was not anything extraordinary.

Q. Did you next pay, on that same day, did you give McConnell notes for one hundred thousand dollars, March 15, 1906, on this transaction which you had in reference to these mining claims which were conveyed to the development company?

A. I don't understand that question—I don't believe I understand that question.

Q. Did you give McConnell, on March 15, 1906, in addition to the ninety-three thousand dollars cash, or by check, did you give him your note for one hundred thousand dollars?

A. My recollection was, as I already stated here in the testimony today, that I gave him and French both notes, my own notes, for one hundred thousand dollars.

Q. March 15, 1906?

A. Well, I could not state the date.

Q. You could not state?

A. No, some time in March, I know that.

Q. Was it prior to the organization of this company, or subsequent?

A. Well, if you have one date, March 15, and the records there, you can answer that better than I can.

Q. I am asking you.

A. I don't know, I don't remember.

Q. You don't know?

A. I would not even try to.

Q. How were those notes paid, one or more notes for the one hundred thousand dollars?

A. There again you have the evidence. I remember distinctly that Mr. McConnell came to me, I think maybe before they were due. I am not sure, but anyway shortly after coming here, and I paid him one or two of those notes, I believe it was two, and at some little inconvenience to myself, too.

Q. Now, do you remember of testifying in this French suit which I have above referred to, on March 8, 1910, in New York, that you gave French your check for twenty thousand dollars in February?

A. I think I already said so; it is my impression today.

Q. And that you gave McConnell your check on March 15, for ninety-three thousand dollars?

A. When those questions were made, Mr. Gorham, and the answers, I had the checks before me and it was not difficult to answer them correctly. Now you have got them and you are asking me questions for the purpose of confusing me.

Q. I am not trying to confuse you. I am trying to get the facts before the jury.

A. The checks are the best facts.

Q. Then the testimony in this record here that the first payment to French was twenty thousand dollars on February 7, 1906, and the payment of ninety-three thousand dollars to Mr. McConnell on the 15th of March, 1906, a payment of twenty thousand dollars to McConnell on the 2nd of April, 1906, a payment of twenty thousand dollars to McConnell on the 31st day of May, 1906, a payment to McConnell of twenty-four thousand dollars on the 1st day of June, 1906, a payment to French on the 22nd day of May, 1906 of six thousand dollars, a payment of twenty thousand dollars to French on the 1st day of June, 1906, a payment to French of ten thousand dollars on the 1st day of June, 1906, a payment to French of seventeen hundred dollars on the 29th day of May, 1906,

a payment to French of twenty thousand dollars on the 14th day of May, 1906, and of ten thousand dollars on the 15th of August, 1906, I will ask you whether that recital of payments is correct?

A. I don't remember. The only other one that I could not—that I can't reconcile, is the April 2nd, because on April 2nd I was in San Francisco.

Q. You will find those beginning on page 157 of this record.

A. If I read it I can't answer—I am not a bookkeeper—I didn't keep the records. At that time you people furnished me with evidence of my own transactions and I could answer it. I have not now any evidence of those transactions and I didn't keep the books—I keep a mighty good memory I can assure you, but when you want to ask me questions like that, it is not right—I can't answer them. The checks are there and they speak for themselves.

Q. I haven't any of the checks, you are mistaken.

A. Some one has them.

Q. They are in the east, in that Court.

A. I beg your pardon.

Q. If this is the record which is subscribed by you and identified by your signature, and your signature identified and which you admit you swore to—if this record discloses that those payments were made in those respective amounts to those respective people on those respective dates, is it true?

A. Does it make up \$245,000?

Q. \$245,000.

A. It is probably true—somebody got the \$245,000—I didn't, that is sure.

Q. Mr. Rosine, who were the directors of the development company in September, 1906?

A. As far as I can remember, A. A. Housman, Henry C. Davies, George Henderson, Mr. Pierce, whose initials I don't remember for the moment, and myself and McLaren. Now, that McLaren I have explained before, that he was put in, as I remember it, in substitution for French, but I may not be correct in regard to that, but the records will show.

Q. Were there not nine directors of the company?

A. Well, you have reference to those gentlemen out here in Seattle who were inactive, Mr. Trenholme and Williams and Mr. Whitehead—now on that basis, that might be a different classification.

Q. They have been read into the record. I am asking your recollection of them.

A. That is right.

Q. At the time you were elected, were not McLaren, Williams and Trenholme elected at the time you were elected a director?

A. Well, I don't remember, it is probable, but I don't remember that.

Q. So that there would be nine directors subsequent to the date when the board was increased, which was March 21, 1906, which is shown by the record in evidence here that they were increased from five to nine—Rosene, McLaren, Williams and Trenholme were elected to fill the created vacancies, and that made up the board of nine?

A. Yes, sir.

Q. Now when you went back to New York, did you have a board meeting?

A. As a board?

Q. Yes.

A. The record will show that. My impression would be, not.

Q. The record shows there was no such meeting?

A. That was as my impression is.

Q. That is, the record files show no meeting, I mean.

A. Well, I don't believe that meeting was exactly as a board, in September.

Q. And you talked with Housman and Henderson?

A. And Davies.

Q. About this subscription which you were authorized to make, one hundred and twenty-five thousand dollars, did you?

A. Yes.

Q. Did you ever make that subscription?

A. What do you mean, in writing?

Q. In any way.

A. Well, I caused the Northwestern Commercial Company—money and property to be given to the Northwestern Development Company but without the commercial company's knowledge, except my own personal knowledge in each instance, and afterwards, of course, the directors of the Northwestern Commercial Company decided to ratify my acts that had been done unknown to them and unauthorized by them by my making this subscription, which was at my pleading and suggestion.

Q. Then the money which you had applied out of the commercial company to the development company, was applied in each instance by you?

A. Well, either by me or—

Q. By your direction?

A. Yes, by myself or direction.

Q. Without the knowledge of your associates in the commercial company?

A. Except as it came to them within a later period, but at the time they didn't know about it.

Q. And that was applied on this subscription which you made for two hundred and fifty thousand dollars, wasn't it, at that time?

A.. No, that would not be true.

Q. Now, just take the fifty thousand dollars and we will get at it easier. On what was the original fifty thousand dollars applied?

A. To help form the company.

Q. On what account?

A. There was not any account. There had been no subscription made at that time except what you might call a mouth piece; Mr. Housman said that he would take the fifty thousand and I said I would take the fifty thousand and two hundred and fifty thousand for the commercial company, but there was no other subscription when I left New York.

Q. Your commercial company records show that the fifty thousand dollars was paid on the 21st day of April, 1906 and credited to the company, and that was subsequent to the time you subscribed for the stock in the name of the commercial company.

A. Well, Pearl, who was the auditor, would naturally carry tabs in his drawer, and they would not go on the record at the time they were made—they could not go previous to the making, but they could frequently go subsequent to that.

Q. Sort of petty cash tab for fifty thousand dollars?

A. No, I would not call it a petty cash tab. He had nowhere to make the entries. There was a dispute there—he knew that.

Q. You reported fifty thousand dollars paid on the subscription by you in the name of the corporation—you reported that at the April meeting of the trustees of the commercial company, didn't you?

A. I reported that I paid fifty thousand dollars—that was a check right there on the table, so that it was not dodged whatever.

Q. It was paid by check?

A. Yes, fifty thousand dollars, or draft or something to evidence it was there. That twenty thousand dollar check which you referred to was right in evidence at that time.

Q. I am now referring to the first payment which you made on the subscription. You reported, according to the testimony of your associates of this case, you reported that there had been fifty thousand dollars paid on this subscription which you made for the commercial company—you reported that at the April meeting.

A. Yes, for the purpose—

Q. Then in July, on the 15th, you made another credit to the

development company of twenty-five thousand dollars on that subscription?

A. You have the date; I believe that is approximately correct.

Q. So that on the 15th of July there had been applied on the subscription seventy-five thousand dollars?

A. Probably in the way of bookkeeping, yes.

Q. That is what the records show, the commercial company's records?

A. Yes.

Q. Which are in evidence here.

A. Yes.

Q. There was no further payment on that subscription, or application of any funds on account of that subscription, according to the defendant company's books until September 6, 1906, one day after the meeting of the board in September, at which you were authorized to subscribe for one hundred and twenty-five thousand dollars—you remember that, don't you?

A. No, I don't remember. The question is if you want to go by the books, Mr. Gorham, ask the bookkeeper—if you want facts, I will give them to you.

Q. At the meeting, September 5, 1906, when a resolution was adopted authorizing you to subscribe to one hundred and twenty-five thousand dollars of the plaintiff's stock, there had at that time been applied on your original subscription only seventy-five thousand dollars?

A. That is not true. The records may show that but it is incorrect.

Q. When you got to New York it was some two weeks later, that would be about the 20th of September?

A. Well, I got to New York in September and I remained there in October and so on.

Q. When did you see Housman and Henderson and Davies about this matter?

A. That is difficult to say—I don't believe the first day I was there, but within less than a week—I would say within two or three days, but I am not sure about that.

Q. And you reported to them that you had been authorized to subscribe one hundred and twenty-five thousand dollars for the commercial company in the development company's stock, did you?

A. No, I reported to them what had taken place, and it might be in a little different language—that the Northwestern Commercial Company's directors would have nothing to do with the subscription, and Mr. Davies knew it before—that they repudiated it, but the only thing I had been able to do was to get them to take

one hundred and twenty-five thousand dollars, and that because it was forced on them, down their throats, if you please.

Q. Why was it forced on them?

A. I beg your pardon?

Q. Why was it forced on them?

A. Because before I left for Nome I was personal guarantor of approximately half a million dollars of the Northwestern Development Company's bills. The only communication we had at Nome then was the cable, which was broke nearly all the time, at St. Michaels, and you didn't know when you could get a communication through, and it was not very kind of me to go and leave Mr. Pearl, because he was really to do it. So I told him, whenever the Northwestern Development Company got in a pinch, if they did, and it was almost sure to do it, to apply freight accounts and merchandise accounts, and I said, "I will guarantee anything to carry them along so that they will not get into trouble until the money came from London."

Q. Mr. Trenholme said that all the transactions between those two companies was on a cash basis, and that the freight was invariably prepaid—that is Mr. Trenholme's statement.

MR. BOGLE: Whether it is a correct statement of Mr. Trenholme or not, it is a matter of argument to the jury.

MR. GORHAM: I have the right to put that statement of Mr. Trenholme's to the witness.

A. When I traveled seventy-five thousand miles a year around this world looking after this business, it would be a hard thing to do to keep track of the details of the office. I was dependent upon Trenholme and Pearl to do it.

Q. You did not know anything about the details?

A. No, sir. I took the statements of the office, and I have yet the first time to find any incorrectness in them.

Q. And what you know about this is only what others told you?

A. Know about what?

Q. About these payments?

A. Oh, I made the order—I have seen it here—to Mr. Pearl to do things, and I daresay there are others, if you could find them, and he had the authority from me, but I could not tell it to the board of the Northwestern Commercial Company, because if I told them what I told Pearl, I would have no sooner been on the steamer than they would have nullified it and then "the fat would be in the fire."

Q. On the 25th day of September you were authorized to subscribe one hundred and twenty-five thousand dollars stock on be-

half of the commercial company, of the preferred stock of the development company, that is the resolution.

A. The records put it that way.

Q. The records have it that way?

A. Yes. In other words, the members of the board of the commercial company acquiesced in what I had already done, and expressed it in that form.

Q. They ratified what you had done up to one hundred and twenty-five thousand dollars, on the original subscription?

A. No.

Q. And put it in the present form?

A. No.

Q. Then what did they do?

A. I told you they swallowed what I choked down their throats, and agreed to stand for it.

Q. What is that?

A. They swallowed what I shoved down their throats and what I had forced on them. They never ratified the original subscription, or had anything to do with that beyond the first time.

Q. What is the first time?

A. (Continuing). And then they kicked it out, and pretty near me, too.

Q. You say they kicked it out?

A. They repudiated it, whatever you like.

Q. They did repudiate it, did they?

A. Yes, beyond any question.

Q. When?

A. Three or four days after I got home.

Q. In your presence?

A. Oh, yes.

Q. Now, I will ask you, Mr. Rosine, if you testified at the former hearing, on the former suit on this subscription—

A. What do you mean, in this Court here?

Q. Yes.

A. The records will show—I believe I did.

Q. Don't you know that you did?

A. Well, you had me here, so that you know.

Q. I am not asking you to state that, Mr. Rosine.

A. I believe I did, yes.

Q. And did you testify at that hearing that your commercial company did not repudiate this subscription in April, 1906?

MR. BOGLE: Wait a moment—I object to that as not proper cross examination.

MR. GORHAM: The witness volunteered it.

MR. BOGLE: We did not go into this matter. If he wants to make him his own witness, I have no objection to his going into it.

MR. GORHAM: On cross examination this witness testified voluntarily that they had repudiated this in April—counsel did not ask him about the April meeting, no, but he left the witness to bring it out.

THE COURT: I don't think you have the right to cross examine him on it.

MR. GORHAM: Then I move to strike out what the witness voluntarily stated.

THE COURT: That voluntary statement of the witness may be stricken and it is withdrawn from the jury.

MR. GORHAM: We could not afford to let it stand without going into it.

THE COURT: Proceed.

Q. (MR. GORHAM). Now, I am trying to find out, Mr. Rosene, what you did after the resolution of September 5, by the commercial company, authorizing its president—you were then its president?

A. Yes.

Q. To subscribe one hundred and twenty-five thousand dollars; what did you do?

A. Do where? I was busy every day.

Q. What did you do with respect to the subject matter of that resolution?

A. I have already stated in the direct examination.

Q. State it again.

A. I told Mr. Housman and Mr. Davies—

Q. I am not going to New York yet—what did you do, pursuant to that resolution and the authority delegated to you by that resolution?

A. You mean here?

Q. Anywhere—so far as subscribing is concerned.

A. What was the use of subscribing for something which had already been paid, that would be another tomfoolery.

Q. Then you did not subscribe, is that right?

A. You mean did I sign another written instrument or something?

Q. Yes.

A. I don't know.

Q. You don't?

A. No, sir; that was already paid. They don't come in the same category.

Q. There was only seventy-five thousand dollars of it paid up to that time?

A. I have heard you thresh over those figures. There was a good deal more. I told you we were carrying the Northwestern Development Company for amounts that it can't show in the records—this record could not contain except incidents—the facts are known quite well to me.

Q. That ledger—

A. (Interrupting.) I don't know anything about the ledger. I never saw one of your company's ledgers around.

Q. This is not mine—this is your company's ledger—this is a correct statement from day to day of the accounts between the companies.

A. Let me give you an instance. At one time we lost a ship, the "Tacoma," and there was a cash transaction, as Mr. Trenholme says, to cover the loss, to the amount of thirty thousand dollars. In 1907 Mr. Douglas and all the officers were here, except Mr. Pearl who was in Teller, and were trying to find out what kind of a cash transaction this was. Some thought somebody still owed thirty thousand dollars or something like that, but I could explain it in a minute with Mr. Pearl, because I knew it was only a piece of a bookkeeping transaction—it was perfectly straight and done for a purpose. Now we had to do that with the development company. Money didn't come along, as we had agreed to. We had contracted for a ship ready to go, and if I had put it on the commercial company's books, Mr. Treat would find it out and there would be trouble, or somebody would.

Q. Notwithstanding that, you recognized the entry in October, 1906 balancing this ledger account on the commercial company's books, at which time the commercial company gave the development company a check for over thirty-two thousand dollars?

A. Well, I don't recognize the entries, because I had nothing to do with the entries, and if they gave them the thirty-two thousand dollars, there would be several reasons for it at the time. At that time we were borrowing three hundred thousand dollars from the trust company, for the development company, and if the commercial company had the right to loan to the development company it would sure be demanded—I was not here—I don't know.

MR. GORHAM: We offer in evidence this transcript of the witness' testimony in the case of French versus the development company, the Supreme Judicial Court of the County of Cumberland, State of Maine, given March 8th, 1910, in New York, signed and sworn to by the witness and identified by him as his signature.

MR. BOGLE: We want to look it over.

DE-DIRECT EXAMINATION.

Q. (MR. BOGLE). Mr. Rosene, you were asked if you made certain statements in some deposition for the taking of your testimony in New York, in some other suit—what suit was it you were talking about?

A. Mr. Mathews who had been here came and told me and brought me papers, that Leigh H. French had sued the development company for approximately a million dollars and that was the suit. He had sued them in Maine but the thing would have to be handled in New York.

Q. The testimony that was taken there in New York, was it?

A. Yes—that is, mine was, and that was all of the evidence I believe.

Q. Did you go down there for the purpose of assisting the development company in defending that suit?

A. I did. That was practically the only business I had for three months.

Q. How long did you stay there?

A. Well, I think I was there from some time in January to some time in April.

Q. On this business alone?

A. I had some other business I intended to do, but there was something going on backwards and forwards. They had made several trips to Portland and Mr. Davies went to Europe. I don't remember the exact details.

Q. Who went down with you, did Mr. Davies go down there with you?

A. No, I went alone. He did not go with me. He might have been there when I got there or we may have come shortly after, but I don't remember that one way or the other.

Q. At whose request did you go?

A. Mr. Mathews.

Q. Who is Mr. Mathews?

A. The gentleman who testified here. He was then the president of the development company, or had been a short time before. He was at one time, he was succeeded by Mr. Davis as president of the development company.

Q. You went down there to assist the development company in defending that suit which French brought against them for a million dollars?

A. Yes.

Q. The development company had some lawyers in New York in charge of it?

A. Yes; they had Mr. Feiner—or some of his associates, but Feiner was the particular attorney that was in charge of the development company's affairs.

Q. Was he in conference with you before taking your testimony on those various matters?

A. Oh, yes.

Q. And I think you said they had your checks and notes there, which you gave at the time of this development company organization in New York?

A.. Yes, they had, and probably some other things that they wanted—whatever they wanted that I had I let them have—I loaned them to them.

Q. And you left them there in their possession?

A. For the time being, because they said they would send them to me shortly after, and I asked Mr. Feiner since and he promised he would send them, but I never got them.

Q. So that when you testified down there that you had the checks and the notes and the other things, which gave you the exact data when it came to questions of figures or times of payment?

A. Yes, sir, the amounts. That transaction was five years old and it is ten years now, and I was not sick then, and I am now.

Q. Now you were asked if you did not state at the taking of that deposition that the development company paid two hundred and forty-five thousand dollars in cash and three million seven hundred and fifty thousand dollars of its common stock for this mining property; now if you made any such statement that the common stock was given in addition to the cash for the purchase of this property, were you speaking of the actual, real transaction as it took place between you, or of the bookkeeping or record which was made under the supervision of this Boston lawyer?

A. Well, of course, under the books and records that was made under the Boston lawyer's, because the actual price for the mining claims was two hundred and forty-five thousand dollars, no more and no less. The rest was nonsense.

Q. You were asked if the board of directors did not consist of nine members mentioned, Mr. Trenholme and Mr. Williams and possibly some one else out here in Seattle—I will ask you did Mr. Trenholme ever qualify as a director of the development company?

A. I don't know, but I don't believe he did.

Q. Did he ever attend a meeting, so far as you know?

A. No, he could not, I am sure of it.

Q. Did Mr. Williams ever qualify as a director of that company?

A. Again I don't believe he did, and he didn't attend any meetings.

Q. Neither of them stockholders?

A. Except by this one share business—that didn't amount to anything.

Q. Did they ever actually receive their share, except to receive it and immediately endorsed it and sent it back?

A. I would not know anything about that, you know, since that was done by themselves.

Q. Was there anyone—any director out here of the development company—I mean anyone who ever qualified as a director, except yourself?

A. No, not in the sense that would be a director.

Q. So that when you mentioned the five members of the board there in New York, those five men did constitute the real board—all that had ever qualified on the board?

A. Yes, sir, either five or six, I don't know how many it was. There was Housman and Davis and Henderson and Pierce and McLaren and Rosene—it seems to me that would be six—now, Mr. McLaren was never present at that time—he never was present any time I was there as far as I remember.

Q. You are a little indefinite whether McLaren was a director at that time or not?

A. I was not sure. Mr. Gorham showed me he was, I believe—I am not in a position to say.

Q. But all the directors were present at this conference, with the exception of French and McLaren, if McLaren was a director?

A. You mean in September, after I came to New York in September?

Q. Yes—I don't mean French but at the time you reported that the Northwestern Commercial Company, at your instance, had finally permitted you to take one hundred and twenty-five thousand dollars of that stock, who was it that was present at that time?

A. Housman and Davies and Henderson and myself, though Pierce was in and out and he was aware of those facts.

Q. That constituted the entire board, so far as they had ever qualified, unless McLaren may have been a member of the board at that time?

A. It constituted the working majority of the board and the only ones that did work.

Q. Now you said, Mr. Rosene, that there was no official meeting held. Where did this meeting take place?

A. This conference—you mean this meeting?

Q. Yes.

A. In the office of A. A. Housman & Company, in Mr. Housman's private room facing Broad Street.

Q. Did the board of directors in their meetings in New York meet at Houseman's office?

MR. GORHAM: If this witness knows.

MR. BOGLE: Was that their place of business in New York?

MR. GORHAM: We object to that as calling for a conclusion of the witness; ask him did he ever attend a meeting there.

MR. BOGLE: If he knows whether that is their place of business.

THE COURT: The records would show it, but if he met with them, or what acts he did in connection with them, he may state.

A. The only meetings that I personally attended to was in Mr. Houseman's office, but I believe that at a later period there was some held in Henderson's office, after they began to have rows, but the meetings and all the meetings held prior to my leaving New York in that year in March were held in Houseman's office.

Q. In March?

A. In March, yes. And it is my impression that that would be the official place.

MR. GORHAM: We object to his impression.

THE WITNESS: It is my belief then, or I know it, for that matter.

Q. (Mr. Bogle) I see on the minutes here: "Minutes of a meeting of the directors of the Northwestern Development Company held at 20 Broad Street in New York City on April 19, 1907, at eleven A. M.," was that the office of A. A. Houseman & Company?

A. Yes.

Q. And that is where this meeting or this conference whatever you call it, was held?

A. Yes, the same room.

Q. You carried back there with you the action of the board of trustees of the commercial company that you were authorized to take one hundred and twenty-five thousand dollars of the stock of the development company; the amount that was already turned over or the amount of the indebtedness was one hundred and twenty-five thousand dollars already paid or just being paid for, to be in payment for that one hundred and twenty-five thousand dollars, didn't you?

A. Yes.

Q. Did you state to them that that was the understanding of

the board here, that it was a settlement of any claim to this old subscription which you made in March 1906?

MR. GORHAM: I object to that as leading; let him ask him what transpired.

THE COURT: Perhaps it is a little leading.

MR. BOGLE: It may be a little leading.

Q. What report or statement did you make to those members of the board of the development company at this time in New York with regard to the attitude of the board of trustees of the commercial company in making this one hundred and twenty-five thousand dollar subscription, or authorizing it to be made.

A. I told them, something they knew before, that the commercial company's directors would absolutely have nothing to do with it; that on the strength largely of Mr. Davis' statement and promise to me in the spring that he would take all that stock from me, not only anything that I took but anything that I had—I had put this thing on the commercial company against the wishes of the directors, and I had, for the reason of the development company's finances, forced it through, and that they would have nothing further to do with it and that was agreeable and there was not any objection raised. It was understood that that was the end of it so far as the transaction was concerned between the two companies.

Q. When you say it was understood—

A. It was agreed.

Q. That is between you and Houseman and Davies and Henderson and Pierce—if he was in and out of this meeting?

A. Well, Pierce understood it if he was not present, he understood it within a short time.

MR. GORHAM: We object to all these conclusions of the witness as to what Pierce understood. He is alive and they can take his deposition.

MR. BOGLE: I did not ask him what he understood—he said Pierce was in and out.

Q. But you say that was agreed between you?

A. Yes. We were all as members of the board, I suppose, of the development company, but we were all stockholders in the commercial company and there was not any question about it. This suit business was the last thought of in the world at that time.

Q. This man Pierce you spoke of, was that the same Pierce that was an employee of Houseman's?

A. That is the only one I knew.

Q. And that was at the office where you were holding that meeting?

A. Well, he was over on the other side of this open board room,

but he would come in every minute and ask Mr. Houseman questions about one thing and another.

Q. Now, Mr. Rosene, it seems from the testimony which has been introduced here, that the stock certificates—that there were certificates for one hundred and twenty-five thousand dollars of the preferred stock of the Northwestern Development Company and an equal amount of common stock that was issued originally by that company to A. A. Houseman & Company and that that was transferred and assigned on the back of it, on the 27th of November 1907—I think that is the date—and sent out to the Northwestern Commercial Company—is that the first time the Northwestern Commercial Company ever received any stock of the development company, November, 1907?

MR. GORHAM: Objected to as not proper re-direct examination. We did not go into the question of this delivery of the stock at all.

THE COURT: It is not re-direct examination but you can recall him if you desire.

(Question repeated to the witness).

MR. GORHAM: We object to that; that question is not predicated upon the facts as disclosed by the record as of date.

THE COURT: He may answer.

(Exception noted for plaintiff).

MR. BOGLE: I am looking for the exhibits—the stock itself was withdrawn and there was a tabulated statement made here—I want to get the correct date.

THE WITNESS: I don't know that I understand your question.

(Former question repeated).

A. I understand the question, but November, 1907 you are talking about. On November 27, 1907, I was at Hot Springs, Arkansas and I would not be aware of anything that took place at that time, and I have not been president of the development company since, and so I can only speak of things that occurred prior to that.

Q. There had been no stock issued by the development company to the commercial company prior to that time, so far as you know, had there?

A. No, it had not so far as I know. There might have been some delivered with the endorsement backward and forward, to Houseman & Company, but I don't remember that.

(Witness excused).

GEORGE J. WILLIAMS called and sworn as a witness for defendant, testified:

That his full name was George J. Williams, resided at Seattle

since 1897, more or less, and was associated with Mr. Rosene in various and sundry enterprises in Alaska.

That he did not recall that he took or received any stock in plaintiff company in March 1906.

That he did not think that he gave any one a proxy to represent him as a stockholder in that company at a meeting held in Portland, Maine, March 29, 1906.

There was not any body in New York authorized to execute a proxy in his name for any stock in the plaintiff company.

That he did not think that he ever qualified as a director of plaintiff company.

That he never acted as a director. That he could not say that he remembered that two shares of stock were sent out from the plaintiff company's office in New York, one running to him and one to Mr. Trenholme, with the request that they be endorsed and sent back there.

Did not remember endorsing the stock and sending it back.

(Witness excused.)

Defendant rested.

PLAINTIFF'S REBUTTAL.

Whereupon, in rebuttal, the plaintiff offered in evidence the deposition of WILLIAM R. RUST, which, with the exhibits thereto attached, were received in evidence and read to the jury, the deposition being as follows:

STATEMENT OF WILLIAM R. RUST.

I was the President of the Northwestern Commercial Company, a corporation of the State of Washington, during the year 1908, including the month of October 1908; that the attached letter, dated Tacoma, May 6, 1908, addressed to Mr. R. L. Cuthbert, signed W. R. Rust, is a true copy of a letter signed by me and mailed to R. L. Cuthbert, representing certain stockholders of preferred stock of the Northwestern Development Company, a corporation of State of Maine, copies of which were by me forwarded to S. W. Eccles, S. Birch, Chas. E. Peabody and D. H. Jarvis on or about the date of said letter;

That on or about October 6th, 1908, at Seattle, Washington, as President of the Northwestern Commercial Company, I received through the U. S. mail or by private delivery, a letter, dated Seattle, October 5, 1908, addressed to the Northwestern Commercial Company, signed E. J. Mathews, President Northwestern Development Company, with two printed enclosures, copies of which said letter of pany, I personally acknowledged the receipt of said letter of October 5, 1908, and enclosures are hereto attached;

That thereafter and during the month of October 1908 at Seattle, Washington, as President of the Northwestern Commercial Com-

pany, I personally acknowledged the receipt of said letter of October 5, 1908, and enclosures, to Mr. E. J. Mathews, President of the Northwestern Development Company, at which time the original capitalization of the latter company including the purchase by it from John Rosene and his associates, of certain mining claims and water rights in Alaska for the sum of \$245,000 cash, and the issuance to said Rosene of \$3,750,000 in common stock, paid-up, of said Northwestern Development Company, was called to my attention by Mr. Mathews and discussed between us;

And that Mr. Mathews did not, at the time of said conversation, make or waive any claim against the Northwestern Commercial Company on said subscription contract but was seeking to induce it to take a share of a proposed bond issue proportioned according to the preferred stock of said Northwestern Development Company then outstanding.

E. J. MATHEWS, recalled as a witness for plaintiff, testified:

That he was formerly president of the plaintiff from about July 1908 to January 1910.

That he had conversation with Captain Jarvis, the treasurer of defendant during witness' incumbency as president of plaintiff; he talked a great deal with Captain Jarvis after witness was elected president of plaintiff; in fact he got most of his information, and grasp of the company's affairs from Captain Jarvis. A topic of conversation between them was the bonus of \$1,250,000 shares of stock issued to the promoters of plaintiff.

Captain Jarvis was treasurer of defendant and witness believed Jarvis did not have the title but was in fact managing director. Jarvis' office was located on the fourth or fifth floor of the Lowman Building and witness' was on the fourth floor—that is the office of the Denny-Renton Clay Company of which witness was president; and when he undertook to accept the position of president of the plaintiff it was at the request of the European stockholders.

He consulted Captain Jarvis in Seattle in Jarvis' office; during the months of say September, October, November and December 1908. He supposed he talked with Captain Jarvis on an average of three times a week, discussing the affairs and relations of the defendant and plaintiff and subsidiary companies of the latter.

The defendant was interested in the plaintiff and had a considerable amount of money and Captain Jarvis was doing what he could in assisting witness in getting a grasp of the plaintiff.

Witness knew nothing about the affairs of the plaintiff at the start.

During those conversations running from October to December 1908, the subject of the bonus stock issued to the promoters of the plaintiff was discussed between them.

He didn't go to the president of the defendant because, Mr.

Jarvis as far as he knew and he was pretty familiar with who was handling the business of the defendant, was the man to see.

He stated awhile ago that Jarvis was performing the duties of managing director, although witness did not know whether Jarvis had that title or not, but that was witness' impression then and it was still his impression, Mr. Rust was president of defendant and lived in Tacoma and would come over two or three times a week and be here a few hours during the day and would go usually back home at night and the next in authority was Captain Jarvis.

(Mr. Jarvis had those conversations with him by what authority) he knew that he was treasurer of the company; he was also a director and so far as witness knew, in the absence of Mr. Rust, was chief in authority.

Mr. Jarvis' statements to witness, during this period of time would disclose and establish the fact that he was in charge of the company's affairs in the absence of Mr. Rust, witness did not recall special instances where his authority was exercised.

He could not say anything more than that next to Mr. Rust, Captain Jarvis was apparently in authority.

(Which last statement was objected to by defendant and defendant moved to strike it out, as incompetent and a conclusion of the witness, which motion was by the court granted, to which ruling of the court the plaintiff excepted and its exception was allowed,

Whereupon the conclusion was stricken.)

What it was that he had observed in the management of the affairs of the company that would indicate that Captain Jarvis was in power was, one instance he recalled, where Captain Jarvis, Mr. Rust and Mr. Thomsen took action in regard to a matter—the relation of the Sesnon Company and the North Coast Lighterage Company—the Sesnon Company being a subsidiary company of the plaintiff and the North Coast Lighterage Company being a subsidiary company of the defendant.

There were three of them taking action.

What was done that would indicate authority was: Captain Jarvis, Mr. Rust and Mr. Thomsen signed his note for \$12,500 to enable the purchase of certain of the Sesnon Company, which was a subsidiary of the plaintiff. The defendant desired the control of the Sesnon Company should reside in the plaintiff because they had an interest in the plaintiff and Captain Jarvis was the man who suggested this arrangement—and it was carried out.

Not all for the interest of the defendant, his interest was not in defendant; so far as the other three were concerned, their interest lay with the defendant. They signed that note individually.

(Whereupon upon motion of defendant that statement of

witness was stricken, to which ruling of the court the plaintiff excepted and its exception was allowed;)

That all the business he did, practically all with defendant was through the treasurer.

He had not had the affairs of this company on his mind for several years and did not recall particular instances, where any of that business was carried out, completed and consummated, further than that the defendant was interested in the success of the plaintiff; they had a considerable amount of money in it and Captain Jarvis and Mr. Rust and others were doing what they could within certain limits to assist the plaintiff.

That he thought, in October 1908, possibly in September also, he discussed with Mr. Rust, the president, the matter of commissions or profits to the promoters of the plaintiff. They discussed the question of the issuance of \$3,750,000 par value of the stock of plaintiff to John Rosene, and Mr. Rust stated that of that amount, \$2,500,000 par value was set aside to be given as a bonus to the subscribers for the preferred shares and the other million and a quarter was a personal profit to Mr. Rosene and his associates.

Cross Examination.

That was in September or October 1908; after this \$125,000 of stock had been issued to defendant.

(Witness excused.)

Whereupon plaintiff offered in evidence defendant's Exhibit No. 3 for the purpose of showing the statement which Mr. Hartman was authorizing as attorney for the defendant to be sent to the secretary of plaintiff. Same was received in evidence.

Whereupon all the parties rested and the testimony was closed and the court proceeded to instruct the jury as follows:

INSTRUCTIONS BY THE COURT TO THE JURY:

Gentlemen of the Jury, you have been selected to try the issues in this case, and have been accepted by the attorneys on both sides because they believe in your fairness and believe that you are unprejudiced and your minds open to consider and fairly weigh all of the evidence which has been offered and admitted in this case. You will approach the issue which is presented here for your determination with that spirit and feeling and consciousness of fairness that if your positions were reversed and you were changed to the position of either of the litigants in this case you would feel that your cause would receive fair consideration. You have a duty and a function to perform in this trial which stands alone and in which you must act alone. You are the sole judges of the facts that have been disclosed upon the trial of this case and upon which the issue which is to be determined must be concluded. The Presiding Judge cannot be of any assistance to you in determining what the facts are. That is your

sole province. The attorneys for the respective parties to this litigation have a special duty and function to perform, and that is, each party presents the facts as they understand them and bearing upon the issue from their view-point, to you. It is your duty to take the facts as presented upon both sides and determine what the real fact is; what the truth is with the relation to the issue here, and report to the court. The Presiding Judge will give you the law which is applicable to those facts, and you are to be governed and guided by the law which I will give you as the Presiding Judge upon this trial, in arriving at the conclusion as to what the facts are in so far as they have relation to the law. You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or the credit that you desire to attach to the testimony of any witness you will take into consideration the demeanor of the witness upon the witness stand, the reasonableness of the stories of the several witnesses who have testified before you; the opportunity of the witnesses for knowing the things about which they have testified; the interest or lack of interest of the several witnesses in the result of this controversy, and surround the witness with all of the circumstances as disclosed by the evidence, and place him in that environment and then see the credence that should be given to this testimony and the weight which his evidence commands, and then place the weight where you believe it ought to be. One witness testifying to a fact or state of facts may outweigh many witnesses. It is not the number of witnesses testifying to any fact, but the quality of the testimony which has weight and which carries the conviction of truth, and that is the criterion upon which you must consider this evidence.

The issue in this case to be determined by you is made by the pleadings which have been filed. These pleadings may be taken with you to the jury room, and may be read by you, and you can determine just what is claimed upon the one side and what is claimed upon the other side, and you will consider that where one party makes a contention and that is admitted in the pleadings, no proof need be offered as to that, because that is taken as confessed; but where a statement is denied upon the other side, then the burden of proof is upon the party who makes the allegation; that is, he must then prove to your satisfaction by a fair preponderance of the evidence that his contention is true. You will find in these pleadings a statement made on one side that it has no knowledge or information sufficient to form a belief with relation to a particular allegation. Under the rules of pleading that is to be taken as a denial, and where such a statement is made in the answer or in the reply, you will require proof of the allegations by a fair preponderance of the evidence. You will likewise consider that if any admission is made upon the trial with relation to the existence of any fact that no proof need be offered of that fact. These pleadings, while you may take

them to the jury room and read them and determine just what is admitted upon one side and denied and the issue which is really offered upon which you must consider evidence, they are not to be considered as evidence in any sense, and you can only determine the facts in this case from the testimony which has been offered and admitted and by the admissions which appear in the pleadings or which are made upon the trial.

In determining and weighing the evidence, you will take into consideration all of the exhibits offered and admitted and consider them for the purpose for which they were designed to be used. I do not think that any of the exhibits have been limited to any particular facts. You can consider them for what they are worth to establish the facts in this case.

The evidence, I think I might say to you, is of two characters, and should be so considered. Direct and positive testimony is evidence of witnesses who know the persons, or said things with relation to the particular matter, or heard what someone else said, or saw what was done; and likewise the exhibits, the papers, documents and writings offered in evidence here which show that certain particular things were done or statements made—these are to be considered in the light of positive or direct testimony. Then there is what is called circumstantial evidence, that is, proof of such facts and circumstances surrounding the conduct of the parties whose relations or conduct may be under investigation which so fit in and dove-tail into the condition and surroundings tending to establish a particular fact as to leave no question as to the condition or relation established by such facts.

Such evidence should be given the weight and consideration to which it is entitled, and sometimes circumstances are more convincing than direct testimony, and it is for you as jurors in this case to eliminate from your minds every other fact which has bearing upon this case save and except the evidence which has been offered and admitted; that is, the testimony of the witnesses and these documents that have been admitted as exhibits, and in that narrow channel, to determine what the facts are in this case.

I think I should also say that when you retire to the jury room that you perhaps will have twelve different view-points upon every issue in this case. You can't come to any conclusion as to the issues in this case by continuing to have twelve different view-points; nor should any juror stand out arbitrarily and simply close his mind to any reason or suggestion on the part of the other members of the jury. But it is your duty as jurors to reason together and take into consideration all of the evidence which has been offered and admitted, compare the various lines of testimony of the several witnesses and eliminate what you believe should not be considered and what should not be given credence or which is not entitled to the weight

which other testimony should receive, and when you have analyzed all of the testimony in that way, assimilate that which you believe to be true and which should be given weight and credence, and then determine what your conclusion should be as to the facts in this case. It will require your entire number to agree upon a verdict in this case.

You are to conclude in this case upon the testimony offered and admitted. If I should make any reference to any testimony or convey to you any opinion which I may have of any fact in this case, I want you to disregard that entirely, because it is not my purpose to convey to you any idea I may have with relation to any fact in this case. And in your consideration of the evidence you should take into consideration the argument made by counsel on both sides. They have reviewed the evidence from their view-point. While their views are not controlling, yet their argument should be considered with relation to the evidence as to whether they have correctly stated the evidence to you, and you will simply consider the testimony as you remember it, and conclude from the evidence you have received from the witnesses and from these documents, and if there is any difference between the testimony as quoted to you by counsel on either side and your recollection of the evidence given by the witnesses or these documents which have been admitted as exhibits, you of course will be controlled by the evidence which has been offered and admitted as you remember it.

In this case the issues have been very fully stated to you by counsel. I will not go into a minute statement of the issues in this case. If you desire you may read the pleadings and determine just what is admitted and what is denied. The issue really is not very complicated, although much evidence has been received to establish the necessary facts, some of which has no direct bearing upon the issue, but it is helpful to explain the relation and conduct of the several parties who are interested in this controversy as officers or stockholders in the one or the other of the parties to this litigation, and likewise with relation to the witnesses who have testified before you, which assists you in weighing the testimony and considering the credibility of the witnesses. Several necessary facts are either admitted or are established beyond any controversy. It is established beyond any question that the plaintiff is a corporation, organized under the laws of the State of Maine and that it was incorporated for the purposes set out in the complaint, that the total capital stock of the plaintiff was and is \$6,250,000.00 par value, and by its certificate of incorporation the plaintiff undertook to divide its stock into two classes, viz., one class is known as preferred stock and is divided into 500,000 shares at a par value of \$5.00 per share. Of this stock 499,989 shares was placed in the name of A. A. Houseman & Co. to be issued at the rate of one share of common stock to the subscriber of one share of preferred stock. The remaining common stock was is-

sued to the several promoters to the amount of 1,250,000 shares. It is admitted that the defendant is a corporation organized under the laws of Washington. It is also established that John Rosine at the time of the organization of the plaintiff was one of its promoters and was President of the defendant company, and at the time was in the City of New York where the promoters met, and at the time charged in the complaint signed the agreement for stock set out in the complaint for \$250,000 in stock in the plaintiff company, and caused to be paid to the plaintiff company, \$50,000. It is also established that at the time he had no authority from the Board of Directors of the defendant company to make the stock subscription. It is also established that the assessment was made for the unpaid subscription on the preferred stock in the manner provided by law and notice of such assessment given to the defendant.

Briefly, it is contended by the plaintiff that the stock subscription by Rosine for the defendant was fully ratified and that it has paid upon the subscription \$50,000 and other payments to the amount of \$125,000 and there is still due \$125,000 with interest from date of the assessment, March 12, 1912; while the defendant contends that the subscription was never authorized, nor was it ratified; that the plaintiff could not issue common stock as a bonus as the subscription of stock of a corporation is a security for all creditors of the corporation, and the stock could not be issued to the defendant without paying for the same, and that if the stock was issued, the defendant would be liable to the creditors for the par value thereof, and that the tender of such stock would not relieve the defendant of liability on the basis of unpaid stock, which is the agreement set out in the subscription of the plaintiff. It further contends that immediately upon it obtaining knowledge that Rosine had subscribed for 250,000 shares of stock in the plaintiff company, a meeting of the Board of Trustees was called in April, 1906, and the subscription disaffirmed, and notice of such action given to the officers of the plaintiff company, and further contends that in September, 1906, it learned that Rosine had applied \$125,000 of the funds of the defendant to the plaintiff as payment of stock subscription, and that on September 5, 1906, the Board of Trustees of the defendant authorized a subscription of \$125,000 and no more, and no other or further subscription was ever recognized. It is also contended by the defendant that the plaintiff was promoted by French, Rosine, Henderson and Houseman, and their associates, under the laws of Maine, which provide, in substance, that all of the capital stock of a corporation must be paid for before the corporation can do business, and that the mining claims that they secured were obtained for \$245,000 cash and were turned over to the company for \$245,000 in cash, and all of the common stock, as already stated, and that 1,250,000 shares of the common stock was issued to these parties as a bonus, and 2,500,000 issued to Houseman for delivery to subscribers of preferred stock, and that

the stock held by Houseman has not been issued as payment for property, and that the property was in effect not worth more than \$245,000, and that the parties had no knowledge of the value and did not make any bona fide effort to obtain a proper valuation of this property, as provided by the laws of Maine. In this connection, you are instructed that under the laws of the State of Maine, a corporation, which would be the plaintiff in this case, had a right to purchase mining property necessary for its business and issue stock to the amount of the value thereof in payment, and the stock so issued shall be fully paid and not liable to any further calls, and in the absence of actual fraud in the transaction the judgment of the directors as to the value shall be conclusive. In considering this particular provision of the statute, it will be necessary for you to consider what actual fraud would be. Actual fraud may be defined as an intentional imposition upon another to his damage. In actual fraud there must appear the following elements: (1) A material representation; (2) That the representation was false; (3) That it was known to be false, or made recklessly without knowledge of its truth, and as a positive assertion; (4) That it was made with the intention that it should be acted upon; (5) That it was relied upon, and (6) That damage was suffered thereby. In considering these phases of the issue in this case you will take this definition of actual fraud into consideration in applying this to the conduct of the parties at the time of the issuance of this stock and the securing of these mining claims, and determine whether they did come within this definition of fraud, and if you find that they did, and that these claims were obtained and this stock was issued without the Board of Directors having any knowledge as to the value, and that the values were recklessly placed upon the claims, of course you could rightfully conclude that they had not complied with this provision of the statute in its organization. Each of these elements must be proven with a reasonable degree of certainty and all must be found to exist. In the case of actual fraud it is different than in the case of implied fraud, and in considering this you will take into consideration the definition which I have given you. If fraud was committed by the promoters of the plaintiff in the valuation of the mining claims and contrary to the provisions of the Maine law that I have just stated to you, then the plaintiff would not be in a position to give a share of the common stock as set out in the subscription agreement, because, as I have already stated, the plaintiff corporation could not legally issue to the defendant corporation or to other subscribers common stock or other stock for which no money had been paid or obligations made and which represents no return to the plaintiff corporation in property or services and labor equal to the par value of the stock, or so estimated, in the absence of actual fraud, by the Board of Directors. And if you find this to be a fact, then of course the

plaintiff company, as I have already intimated to you, could not comply with the agreement which is set out in its complaint with relation to the transferring of one share of common stock with each share of preferred stock that has been subscribed. In this connection, I should further instruct you that the plaintiff, in its reply, has stated that these facts all came to the knowledge of the defendant more than three years prior to the commencement of this action, and that the defendant had knowledge of all of these facts, that is, fraudulent acts, if any were committed by the defendant, and did not take any steps to disaffirm or disavow the contract. In this connection, you are instructed that if the defendant had knowledge of the fraudulent transaction, if you find that the transaction was fraudulent, and that the trustees were guilty of actual fraud as set out in the Maine law, and that the defendant, through its officers, had knowledge of these acts more than three years prior to the commencement of this action, which was March 29, 1912, and took no action to disavow the contract or to be relieved from the contract by bringing an action to have it set aside, then of course it could not raise that at this time.

You are further instructed that where an unauthorized subscription is made by an officer of a corporation; that is, where an officer of a corporation, as Rosine did for the defendant in this case, makes a subscription of capital stock which is not authorized, the company or corporation is not bound by that subscription, until, through its proper officers, it has affirmed the subscription. The act of affirmance may be made in several ways. It must be made, under the laws that govern the issue here, by the Board of Trustees, either actually or by such conduct as leaves no other reasonable inference but that it was affirmed. This may be done in several ways. It may be done by passing a formal resolution and making such act the act of the Board, or by such conduct with relation to the subscription as would estop the corporation from declaring otherwise, as when payments are made by the corporation on the subscription agreement, after report to the Board of such act, and the treatment of the act as the act of the Board of Trustees. In determining the question of affirmance, you will weigh all of the evidence which has been offered and admitted; taking into consideration what the Board of Trustees of the defendant company actually did, if anything, or what it did not do. When you believe that reasonably prudent conduct would have required them to do something as disclosed by the evidence in this case; and determine from all of the evidence which has been offered and admitted with relation to the conduct of the Board of Trustees towards this act of Rosine, or its officer, in making this subscription as to whether it was affirmed, and if you believe that it did by its active or passive conduct actually affirm the subscription, and that no other reasonable conclusion can be

reached from this conduct, then it will be an affirmance. On the other hand, if you believe from the evidence that upon learning that the subscription had been made, a special meeting of the Board of Trustees was called, and the subscription considered, and disapproved by the Board either by passing a resolution orally or in writing, or by such concurrent expression of sentiment and voice by the individual trustees assembled as a Board, which all believed was an act of disapproval by the directors as a Board, such would be an act of disaffirmance, whether a resolution was actually passed or not, provided action was taken by the trustees as a Board and was so considered by the trustees. In this connection you are instructed, however, that the mere expression of individual opinion by the individual trustees, without any concurrent action, would not be considered as the action of the Board, if it was not understood by the board to be an action on the part of the Board. You are also instructed in this connection, that it would not be necessary for the Board to put its action upon the minutes. If the Board of Trustees met and did an act with relation to this subscription, either in affirmance or disaffirmance, it was not necessary in order to bind the defendant company, to put that act upon the minutes. If it was done, that is sufficient, provided notice of this action on the part of the Board was given to the officers of the defendant company or some officer who was entitled to receive such notice, and you are instructed that a member of the Board of Directors of the defendant company would be a proper person to be so advised. The notice need not be in writing. It may be made in writing—

MR. BOGLE: Your Honor used the words "defendant company," when you meant "plaintiff."

THE COURT: Give notice to the plaintiff corporation—if I used the word "defendant" I meant "plaintiff."

Now, the notice need not be in writing. It may be made in writing or may be oral, and either would be effective, but it must be established to your satisfaction with the same preponderance as any other fact in the case that notice was actually given. And you are instructed that if disaffirmance was made and notice of such fact was given to the plaintiff company or some of its officers, the act of disaffirmance would then be complete. You are further instructed that if you should find that after the meeting in April, 1906, further payments were made by Rosine, or through his direction, or by the defendant through other officers, and that on September 5, 1906, at a meeting of the Board of Trustees, subscription to the amount of \$125,000 was authorized, then the plaintiff cannot recover in this case, if you find that the directors at a meeting in April, 1906, had disaffirmed the subscription. But if you should find that the directors in April, 1906, did not disaffirm the subscription, but that the action on the part of the

Board was continued and the defendant company continued to pay further sums upon the subscription, and then in September, 1906, passed a resolution authorizing subscription to the amount of \$125,000, and you believe from the evidence in this case that the defendant by its conduct prior to the 5th day of September, 1906, had ratified and affirmed the subscription, then the plaintiff would be entitled to recover, as defendant would not be permitted to affirm a subscription and then disaffirm one-half of it, unless you should find from the evidence in this case that the charge of fraud in the organization of the company as to the valuation of the property that was transferred to the plaintiff company has been sustained as heretofore referred to in these instructions, and that the defendant company did not have notice of such actual fraud on the part of the directors in the valuation of the property for more than three years or three years prior to the 29th day of March, 1912, and took no action to disaffirm it.

In this case I will not attempt to analyze the testimony and to take up the several parts of the evidence and apply it to the other parts and then apply that to the law as given to you for your direction, because the evidence has been very fully analyzed by counsel upon both sides, and I have given you the law now which is to govern you in your deliberations in this case. You will weigh all of this evidence, and when you have agreed upon the facts in this case, you will indicate that by the verdict which you will return. You can return one of two verdicts. The plaintiff is either entitled to recover for the entire sum sued for or it is entitled to recover nothing. If you find for the plaintiff, then this will be your form of verdict:

"We, the jury in the above entitled cause, find for the plaintiff in the sum of \$152,895.80, being the sum of \$125,000, with legal interest from March 12, 1912, to date."

I had the Clerk make the computation and include the total sum. If you find for the defendant, this will be your form of verdict:

"We, the jury in the above entitled cause, find for the defendant."

Whichever verdict you find, you will cause to be signed by your foreman, whom you will elect immediately upon retiring to the jury room.

Have I covered the entire case, or are there any omissions or exceptions?

MR. GORHAM: I would ask the Court to instruct the jury with reference to the ratification of the issuance of the stock by the defendant through the Housman proxy, January 23, 1907, that is part of the pleadings and part of the proof.

MR. BOGLE: I don't think that that is competent here, be-

cause there is not a particle of evidence that this defendant was represented at that meeting. As a matter of fact, it is admitted, as shown by their own record, that the defendant was not a stockholder of record.

THE COURT: I don't care for any argument. Are there any other omissions?

MR. BOGLE: I think your Honor in instructing in regard to the fraud in the valuation of the mining property, failed to instruct the jury that if they found that there was a fraud that they would return a verdict in favor of the defendant. You defined a fraud, but you did not specifically instruct them what would be the effect if they found there was a fraud under your definition. I assume that would be understood by the jury, but I want to call your attention to it.

MR. GORHAM: I think, if the Court please, I understood you to say that all the capital stock of the plaintiff company must be paid before, under the laws of Maine, it could not do business.

THE COURT: That was a mis-statement, yes.

MR. GORHAM: —not to entitle it to do business—doing business is not an issue here and I don't think your Honor meant to give that instruction. I would like to have the Court withdraw the instruction then, because it is not the law under the state of Maine.

THE COURT: Yes. That part of the instruction where I said that all of the capital stock must be paid before it can do business—that is withdrawn; but what I mean to say—the Maine law requires capital stock to be paid, and which means paid in the way of either cash or in the way I indicated in the instruction.

MR. GORHAM: Did your Honor mean to instruct the jury that it should be paid in full, that the law of Maine requires it to be paid in full?

THE COURT: As calls are made by the directors or the proper officers of the company.

It has been suggested by counsel for the plaintiff that you be further instructed with relation to the plaintiff's contention upon the stock deposited with Housman & Company.

You are instructed that the stock that was deposited with Housman & Company, if you should find that no fraud was committed, and that the board of trustees did value the property in the way indicated in these instructions, and that no actual fraud was committed, and that this stock was in fact issued to Rosine or his order in payment for the property, then Housman would have that stock, not as purely a bonus stock, but a stock which could be, under the Maine law, considered paid in full and for which no further demands could be made.

Counsel for defendant has asked that I instruct you a little further with relation to your conduct should you find—as to what your verdict should be should you find that actual fraud was committed and that the common stock which was deposited with Housman & Company was still subject to further assessment.

I will instruct you in this connection that if you should find that actual fraud was committed, as outlined in the instruction, and the defendant company did not have notice of that for three years prior to March 29, 1912, then you should find for the defendant in this case. But if you find that fraud was committed, and find the defendant knew of that for three years at least prior to March 29, 1912, then you would have to further find upon the other phase of the law and facts, that is the law that I have given you and the facts as disclosed by the witnesses, as to whether the stock subscription was ratified or not, and your verdict then should be as you find, either for the plaintiff or for the defendant.

MR. GORHAM: I desire to request the Court to give instruction number 16 as filed by the plaintiff.

MR. BOGLE: I suppose your Honor will note exceptions taken after the jury retires.

THE COURT: I would like to note the exceptions, but the circuit court of appeals dismissed an appeal filed some time ago because the exceptions were not taken in the presence of the jury. That is why I made the suggestion to take the exceptions now.

The plaintiff requests me to give this instruction. This is in substance what I have stated to you, but I will read it.

The plaintiff had the legal right to issue all of its common stock to John Rosine in part consideration of the conveyance by Rosine to it of certain mining properties and water rights, provided that all of its then stock subscribers concurred therein. And if you find that all of plaintiff's common stock was issued to John Rosine for such properties, with the concurrence of all its then stock subscribers, and all of the holders of its capital stock then outstanding—I will just modify that—provided they acted in good faith in the matter and were not guilty of actual fraud in the transactions as I have already instructed you, then such issue was legal. legal.

MR. GORHAM: We desire now to note an exception, if the Court please, for the failure to give particularly instruction number 16 as among the requests of the plaintiff.

MR. BOGLE: If the Court please, we except to that portion of the instructions given by your Honor to the effect in substance that if the jury finds that this stock that was issued, deposited with Housman & Company, was issued fraudulently without any consideration having been received by the corporation for it, that

is not a defense in this case if the defendant had knowledge of the fact three years or more before the institution of this action.

We except to that part of the instruction which finds what constitutes fraud in that connection, for the reason that it omits to instruct the jury that if the valuation was made by a board of directors of the plaintiff company who, by a combination prior to that, were interested in this identical stock and who had agreed to divide this stock among themselves in a bonus, but to put a valuation on the property in their resolution so that it would appear that the company was getting payment for it, that that is of itself a fraud within the definition your Honor has given. It is applicable to the facts here, because it was French and Housman and Davies and Henderson, representing Rosine, were the men who made that valuation.

THE COURT: Yes. I have your idea.

MR. BOGLE: Now, I take it, you have somewhat modified instruction number 1 as requested by the defendant.

THE COURT: Yes.

MR. BOGLE: We will note an exception to the failure to give it in the form requested and to the modification which your Honor made. Did your Honor embody instruction number 2 in your general charge—I could not follow it.

THE COURT: I gave a portion of number 2.

MR. BOGLE: I think you gave number 3 substantially as requested, so far as I could gather. I will note an exception to the failure to give defendant's instruction number 2 as requested in the form requested, and to the modification made by the Court.

THE COURT: All right. With relation to the exception to the instruction upon the definition of fraud, the jurors were instructed to take into consideration all of the circumstances surrounding the conduct and acts concerning which testimony was given, and I think it is fully covered. That is all. You may swear the bailiffs.

(Whereupon the bailiff was sworn to take charge of the jury.)

THE COURT: Let the jurors take their places in the jury box again.

I forgot—I omitted to suggest to you that the further and third affirmative defense in the answer has been stricken from the answer and is not to be considered by you. I just drew a line across it, and you will omit that in reading these pleadings.

MR. BOGLE: May I have just one more exception to the instructions?

I want to note an exception to that portion of your Honor's instructions which tells the jury to examine the pleadings, con

sisting of the complaint and answer and the reply, and determine the issues they are to try from the pleadings.

(Whereupon the jury retired to deliberate upon their verdict and counsel agree as to what exhibits are to go to the jury.)

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2117.

Maine Northwestern Development Company, a corporation,
Appellant.

vs.

Northwestern Commercial Company, a corporation, Appellee.

Certificate of Judge.

The foregoing is a true, complete and properly prepared statement of all of the testimony introduced upon the trial of the above entitled cause in the United States District Court, for the Western District of Washington, Northern Division, essential to the decision of the questions presented by the appeal of said cause heretofore herein petitioned for and allowed by said District Court, together with all objections and exceptions made and taken to the admission or exclusion of evidence, and all motions and rulings thereon made upon said trial, and together with the Instructions of the Court to the Jury upon said trial and the exceptions taken by the plaintiff to the refusal of the court to give to the jury Instruction No. 16, as requested by the plaintiff, which exception was taken at the close of the court's instruction to the jury and in the presence of the jury and before it retired; and which testimony, together with the original exhibits offered and admitted upon the trial of said cause, and consisting of Plaintiff's Exhibits:

D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18.

E1, E2, E3, E5, E11, E12, E13, E14, E15, E16, E17, E21.
F, F1, F2.

G, H, I, J, K, K1, L, M, N, N1, N2, S1, S1½, S2, S3, T1, T3, T4, T5.

AA, BB, CC, DD, EE, FF, GG, HH.

Stipulation of parties, in re statement of W. R. Rust, dated July 2, 1915, filed July 15, 1915.

Exhibit (defendant's) marked for identification No. 3, stipulation of parties, in re amendment of pleadings, dated May 11, 1914, filed May 12, 1914, offered by plaintiff and excluded by the Court on the objection of defendant.

Defendant's Exhibits:

Nos. 1, 2, 4, 5, 6.

No. 3 for Identification, offered by defendant, objected

to by plaintiff, ruling reserved by Court on objection; offered by plaintiff and received in evidence, constitute all of the evidence introduced upon said trial essential to the decision of the questions presented by said appeal, and the same is hereby approved.

So much of said testimony as is reproduced in said statement in the exact words of the witness is so reproduced at the special instance and desire of the above named appellant, and the court hereby directs such reproduction.

Dated Seattle, Washington, this 20th day of March, 1916.

JEREMIAH NETERER,

United States District Judge of the United States District Court, for the Western District of Washington, Northern Division, presiding at the trial of said cause.

Indorsed: Statement of Evidence. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 20, 1916. Frank L. Crosby, Clerk.

United States District Court, Western District of Washington,
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.

Instruction No. 16 Requested by the Plaintiff.

The plaintiff had the legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights, provided that all of its then stock subscribers and all of the holders of its capital stock then outstanding concurred therein; and if you find that all of Plaintiff's common stock was issued to John Rosine for such properties, with the concurrence of all its then stock subscribers and all of the holders of its capital stock then outstanding, then I instruct you that such issue was legal; and if you further find that all of the four hundred and ninety-nine thousand nine hundred and eighty-nine (499,989) shares thereof alleged by Plaintiff and admitted by the Defendant as issued to A. A. Housman & Co. for the benefit of the subscribers to the preferred stock of Plaintiff, there was thereafter by said A. A. Housman & Co. assigned to and is now held by Plaintiff sufficient for Plaintiff to issue and deliver to Defendant one share thereof for each five dollars (\$5.00) paid on Defendant's subscription; then I further instruct you that such issue and delivery by Plaintiff to Defendant would be in performance of Defendant's subscription. And I further instruct you that the validity of the issue of Plaintiff's common stock in part

consideration for the conveyance by Rosene of said mining properties to the Plaintiff would not be in the least affected by the fact that Rosine was making a commission as promoter if that fact was known to all directors of Plaintiff and to all of its then stock subscribers and all of the holders of its stock then outstanding and there was no objection made by any of them thereto.

Indorsed: Instruction No. 16 requested by the Plaintiff. (Excerpt from Plaintiff's request for instructions.) Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 1, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States for the Western District of Washington.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Verdict.

We, the jury in the above entitled cause, find for the Defendant. Geo. H. Mead, Foreman

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 1, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Judgment.

The above entitled action having come on regularly for trial, on Tuesday, November 23, 1915, William H. Gorham, Esquire, appearing as attorney for the plaintiff, and Messrs. Bogle, Graves, Merritt & Bogle, appearing as attorneys for the defendant, and a jury having been duly and regularly impaneled and sworn to try said action, evidence was introduced by each of the respective parties, said cause being continued from day to day until Wednesday, December 1, 1915, whereupon, after hearing all of the evidence, the arguments of counsel for plaintiff as well as for defendant, and the instructions of the Court, the jury retired to consider their verdict, and subsequently on December 1, 1915, returned into open Court and in the presence of the parties hereto, returned the following verdict, to-wit:

"We, the jury in the above entitled cause, find for the defendant,"

which said verdict was duly filed and entered of record;

Now, on this day, the defendant, by its attorneys of record, appearing and moving the Court for judgment upon the verdict of the jury as heretofore entered in said cause, plaintiff being in open Court,

It is ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Maine Northwestern Development Company, take nothing by this action, and that the defendant, Northwestern Commercial Company, go hence without day and recover from the plaintiff its costs herein taxed at the sum of..... Dollars (\$.....).

ORDERED and ADJUDGED in Open Court this 2nd day of December, A. D., 1915.

JEREMIAH NETERER, Judge.

O. K. as to form. W. H. G., Atty for Pltff.

Service of within Judgment this 2nd day of December, 1915, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsement: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Petition for Appeal and Order.

To the Honorable Jeremiah Neterer, United States District Judge, for the Western District of Washington, Northern Division:

The above named plaintiff, conceiving itself aggrieved by the judgment made and entered on the second day of December, 1915, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that its appeal may be allowed and that citation issue as provided by law, and that a transcript of record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United

States Circuit Court of Appeals, for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Dated Seattle, Washington, March 7, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

The foregoing petition is granted and appeal is allowed upon giving bond conditioned as required by law in the sum of \$500.00.

Dated Seattle, Washington, March 7, 1916.

JEREMIAH NETERER,

District Judge, United States District Court, Western District of Washington, Northern Division.

Indorsed: Petition for Appeal and Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Assignment of Errors.

Now on this 7th day of March, 1916, comes the above named plaintiff, by its attorney, William H. Gorham, and says that the judgment in said cause is erroneous and against the just rights of said plaintiff, for the following reasons:

First: Because the court erred in sustaining the objection of the defendant to the introduction in evidence by plaintiff of plaintiff's exhibits marked E-4, E-5, E-6, E-7, E-8, E-9 and E-10, to which ruling the plaintiff excepted and its exception was allowed by the court;

Second: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of a stipulation between the parties to said cause of date May 11, 1914, filed in the above entitled cause May 12, 1914, stipulating for the amendment of the pleadings, to which ruling plaintiff excepted and its exception was allowed by the court;

Third: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of the minutes of the meeting of the Executive Committee of defendant of date October 23, 1907, including a resolution as follows:

"BE IT RESOLVED: That Mr. Eccles be requested to call a meeting of the trustees at a very early date, for the purpose of asking for the resignation of President Rosene, or accepting the resignation of the balance of this committee," to which ruling plaintiff excepted and its exception was allowed by the court;

Fourth: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, H. W. Treat, on direct examination, to-wit:

Q. Then I will ask you this question, Mr. Treat. Did the Board of Trustees of the Northwestern Commercial Company, the defendant, at any meeting attended by you, authorize Mr. Rosene to subscribe for stock in the Northwestern Development Company, the plaintiff here, prior to the Board meeting of September 5, 1906?

to which the witness answered: "No, sir," to which ruling the plaintiff excepted and its exception was allowed by the court;

Fifth: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, H. W. Treat, on direct examination, to-wit:

Q. State what took place before the Board at the time when those resolutions were adopted, to which the witness answered:

A. We had a general discussion and looked into the accounts of both companies and found that the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that if we were to settle upon a \$125,000 sum it would merely square the account and make it satisfactory to both companies and start over again, as it were. So the transfers were made. There had been some transfers made in the books without coming up again as I don't think there was any cash paid for any of this stock. I think it was merely a question of book-keepers' transfers and journal entries, to which ruling plaintiff excepted and its exception was allowed by the court;

Sixth: Because the court overruled the objection of the plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

Q. Did the Board of Trustees of defendant, Commercial Company, at any time ratify any subscription made by Mr. Rosene to the capital stock of the Development Company outside of the subscription authorized at that meeting of September 5, 1906?

to which the witness answered: "They did not," which ruling plaintiff excepted and its exception was allowed by the court;

Seventh: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

Q. Did you notify him, or had he been notified, so far as you could tell from your conversation with him, of this action of the Board of Trustees of the defendant company?
to which the witness answered:

A. I met Mr. Davies at the entrance of the Butler Hotel and we walked into the hotel and sat down there and began talking about the Development Company, and he asked me about the trouble that we are making for Mr. Rosine out here, and he asked me what it was all about and I told him. I told him of the action of our trustees with reference to his subscription. I told him of our action, of the trustees, with reference to this subscription of that \$250,000,
to which ruling the plaintiff excepted and its exception was allowed by the court;

Eighth: Because the court erred in refusing to give the jury instruction No. 16, as requested by plaintiff, as follows:

"The plaintiff had the legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights, provided that all of its then stock subscribers and all of the holders of its capital stock then outstanding concurred therein; and if you find that all of plaintiff's common stock was issued to John Rosene for such properties, with the concurrence of all then stock subscribers and all of the holders of its capital stock then outstanding, then I instruct you that such issue was legal; and if you further find that all of the four hundred and ninety-nine thousand, nine hundred and eighty-nine (499,989) shares thereof alleged by Plaintiff and admitted by Defendant as issued to A. A. Housman & Co. for the benefit of the subscribers to the preferred stock of Plaintiff, there was thereafter by said A. A. Housman & Co. assigned to and is now held by Plaintiff sufficient for Plaintiff to issue and deliver to Defendant one share thereof for each five dollars (\$5.00) paid on Defendant's subscription; then I further instruct you that such issue and delivery by Plaintiff to Defendant would be in performance of Defendant's subscription. And I further instruct you that the validity of the issue of Plaintiff's common stock in part consideration for the conveyance by Rosene of said mining properties to the Plaintiff would not in the least be affected by the fact that Rosene was making a commission as promoter if that fact was known to all directors of Plaintiff and all of its then stock subscribers and all of the holders of its stock then outstanding and there was no objection made by any of them thereto.

to which refusal plaintiff excepted and its exception was allowed by the court;

Ninth: Because the evidence showed that the common stock of plaintiff company, fully paid, was legally issued for a valuable consideration and was delivered as follows: \$2,500,000, par value, as a bonus to the subscribers to the preferred stock of plaintiff company, \$1,500,000, par value, as a bonus to John Rosine and his associates, promoters of plaintiff company;

Tenth: Because the evidence showed the fact that \$2,500,000, par value, of the common stock of plaintiff company, fully paid, was issued as a bonus to the subscribers to the preferred stock of plaintiff company, and the further fact that \$1,250,000, par value, of the common stock of plaintiff company, fully paid, was issued and delivered to John Rosene and his associates, promoters of plaintiff company, as a bonus, were known to defendant in the month of October, 1908, more than three years prior to the commencement of this action;

Eleventh: Because the evidence showed that the defendant's president reported the subscription in suit and the payment of \$50,000 on account thereof out of defendant's funds, at a meeting of defendant's Board of Trustees held at Seattle within two weeks after the making of said subscription, and that upon receiving said report the defendant failed to repudiate the same, failed to notify plaintiff of any repudiation of same, and failed to place the plaintiff in statu quo;

Twelfth: Because the evidence showed that at a time when defendant had acknowledged that \$75,000 of its funds had been paid to plaintiff to apply on account of the subscription in suit, to-wit: On September 5, 1906, it further ratified and confirmed said subscription by assuming to ratify and confirm it for the sum of \$125,000;

Thirteenth: Because the evidence showed that there was no compromise entered into between the parties releasing defendant from further claim of liability on said subscription, as alleged in the second Affirmative Defense of Defendant's Amended Answer to the Amended Complaint;

Fourteenth: Because the evidence showed that plaintiff at all times subsequent to its organization had under its ownership and control a sufficient amount of the common shares of its capital stock, legally issued, for a valuable consideration, to be able to issue common stock, full paid, to all the subscribers in the preferred shares, including defendant, in performance of its subscription contract and the subscription in suit; and that plaintiff tendered into court, for defendant's benefit, 25,000 shares of common stock of plaintiff, legally issued, for a valuable consideration, to comply with said subscription in suit;

Fifteenth: Because the evidence showed that the allegations of the amended complaint and of the reply were true, and that the allegations of the answer were not true;

Sixteenth: Because the court erred in entering judgment that the plaintiff take nothing by this action, and that this defendant go hence without day and recover its costs;

Seventeenth: Because the court erred in not entering a judgment for plaintiff against defendant in accordance with the prayer of the amended complaint;

WHEREFORE, plaintiff prays that said judgment be reversed and that this Honorable Court will direct the entry of a judgment or decree in accordance with the prayer of plaintiff's Amended Complaint.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States Circuit Court of Appeals for the Ninth Circuit.
No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Appellee.
Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, the Maine Northwestern Development Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, acknowledge ourselves to be jointly indebted to the Northwestern Commercial Company, Appellee, in the above entitled cause, in the sum of (\$500.00) Five Hundred Dollars, conditioned that:

WHEREAS, on the 2nd day of December, 1915, in the United States District Court, for the Western District of Washington, Northern Division, in an action depending in that court, wherein the Maine Northwestern Development Company was plaintiff and the Northwestern Commercial Company was defendant, numbered 2117 on the law docket, judgment was rendered against the Maine Northwestern Development Company, Plaintiff, and the said Maine Northwestern Development Company, having obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court, to reverse the said judgment; and a citation directed to the said Northwestern Commercial Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of

Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 3rd day of May, 1916 next.

NOW, if the said Maine Northwestern Development Company shall prosecute its appeal to effect and answer all costs if it fails to make its appeal good, then the above obligation to be void, else to remain in full force and virtue.

MAINE NORTHWESTERN DEVELOPMENT COMPANY,

By T. A. Davies, its President.

(SEAL) Fidelity and Deposit Company of Maryland.

By J. A. Cathcart, Attorney in Fact.

Attest by L. J. Wyckoff, Surety.

APPROVED as to form and sufficiency of sureties this 7th day of March, 1916.

JEREMIAH NETERER,

District Judge, United States District Court, for the Western District of Washington, Northern Division.

Copy of the foregoing Bond on Appeal received at Seattle, Washington, this 7th day of March, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Defendant.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western Division of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs.

Northwestern Commercial Company, a corporation, Defendant.
Notice of Lodgment of Statement.

To the Northwestern Commercial Company, the above named defendant, and to Messrs. Bogle, Graves, Merritt & Bogle, its attorneys:

You and each of you are hereby notified that the above named plaintiff has prepared and this day lodged in the office of the clerk of the above entitled court at Seattle, Washington, for you examination, a statement of all of the testimony introduced upon the trial of the above entitled cause essential to decision of the questions presented by the appeal of said cause heretofore herein petitioned for and allowed by the court, together with all objections and exceptions made and taken, to the admission or exclusion of evidence and all motions and rulings thereon made upon said trial;

And you are hereby further notified that the above named plaintiff will, upon the 20th day of March 1916, at the hour of ten o'clock

A. M., of said day, at the courtroom of the above entitled court in the United States Courthouse, in the City of Seattle, State of Washington, present said statement to the above entitled court and to the Honorable Jeremiah Neterer, the presiding judge thereof and the judge presiding at said trial, and ask said court and judge to approve the same.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of the foregoing Notice of Lodgement of statement received in Seattle, Washington, this 7th day of March, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Notice of Lodgment of Statement of testimony. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington
Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee.
Motion.

Comes now the Defendant, Northwestern Commercial Company, by its Attorneys, and moves the Court to recall the Citation issued over the signature of this Honorable Court under date of March 8, 1916, and to correct said Citation or, in the alternative, quash the same, because said Citation was improvidently issued and is not in proper and legal form, and contains recitals that are not correct in fact, in this: Said Citation, referring to the above entitled cause, contains a statement in words as follows: "Wherein an equitable defense was interposed by answer," when in fact no equitable defense was interposed in said action by answer or otherwise.

This motion is based upon the pleadings, records and files herein, including the memorandum opinion of this Court on file therein.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Copy of the within motion this 9th day of March, 1916, admitted.

WILLIAM H. GORHAM,
Attorney for Defendant.

Indorsed: Motion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 9, 1916, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District
of Washington, Northern Division

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.
Order.

This day came on for hearing the motion of the defendant to recall the citation heretofore issued in the above entitled cause, citing the defendant to appear in the Circuit Court of Appeals on the appeal taken herein, and to amend or quash the same, and the Court, being of the opinion that the appeal herein having been perfected, it has no jurisdiction to consider said motion, the same is denied.

Ordered this 20th day of March, 1916.

JEREMIAH NETERER, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 20, 1916. Frank L. Crosby, Clerk. By F. L. C.

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2117.

Maine Northwestern Development Company, a corporation,
Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee
Order as to Exhibits.

It appearing, in the opinion of the judge presiding in the United States District Court, for the Western District of Washington, Northern Division, necessary and proper that the original exhibits offered and received in evidence or filed in said cause on trial thereof, should be inspected in the above entitled court upon appeal,

IT IS ORDERED that said original exhibits be retained for safe keeping by the clerk of said District Court, to be by him transmitted under his hand and seal of said District Court to the clerk of the above entitled court at San Francisco, California, as a supplemental record herein upon appeal.

Dated Seattle, Washington, March 9, 1916.

JEREMIAH NETERER,

Presiding Judge in the United States
District Court for the Western District
of Washington, Northern Division.

Indorsed: Order as to exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 9, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2117

Maine Northwestern Development Company, a corporation,
Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee.

Certificate of Clerk, U. S. District Court to Original Exhibits

United States of America, Western District of Washington, ss

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the attached documents constitute all the original exhibits introduced and received in evidence and used upon the hearing and trial of the above entitled cause, as follows:

PLAINTIFF'S EXHIBITS:

D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18, E1, E2, E3, E5, E11, E12, E13, E14, E15, E16, E17, E21, F, F1, F2, G, H, I, J, K, K1, L, M, N, N1, N2, S1, S1½, S2, S3, T1, T1, T4, T5, AA, BB, CC, DD, EE, FF, GG, HH;

Stipulation of parties, in re statement of W. R. Rust, dated July 2, 1915, filed July 15, 1915.

Exhibit (defendant's) marked for identification No. 3.

Stipulation of parties, in re amendment of pleadings, dated May 11, 1914, filed May 12, 1914, offered by plaintiff and excluded by the Court on the objection of defendant.

DEFENDANT'S EXHIBITS.

Nos. 1, 2, 4, 5, 6.

No. 3 for identification, offered by defendant, objected to by plaintiff, ruling reserved by Court on objection; offered by plaintiff and received in evidence;

which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above entitled cause; which said exhibits are so transmitted pursuant to the order of the said District Court, so directing.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 28th day of March, 1916.

(Seal)

FRANK L. CROSBY,
Clerk, U. S. District Court.

In the United States District Court for the Western District of
Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company ,a corporation,
Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.
Praeipe for Record on Appeal.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a record on appeal in the above entitled
cause, consisting of the following:

- (1) A caption exhibiting the proper style of court and the title of the cause; a statement showing the time of commencement of the cause; the names of the parties, the several dates when the respective pleadings were filed, the time when the trial was had and the name of the judge hearing the same; the several dates of the entry of the verdict of the jury, of the judgment, of the filing of the petition for appeal; of the allowance of said Petition by the court and of the filing of the Assignment of Errors.
- (2) The Amended Complaint filed July 21, 1915;
- (3) The Amended Answer to the Amended Complaint filed September 21, 1915;
- (4) Plaintiff's Motion to Strike the Third Affirmative Defense of the Amended Answer filed October 2, 1915;
- (5) The order granting plaintiff's Motion to Strike the Third Affirmative Defense of the Amended Answer, entered October 7, 1915;
- (6) The Reply;
- (7) The Statement of Testimony, as approved by the court and filed in said cause;
- (8) Instruction No. 16 requester by the plaintiff;
- (9) The verdict of the jury entered December 1, 1915;
- (10) The judgment entered December 2, 1915;
- (11) The Petition for Appeal, with allowance of the court;
- (12) The Assignment of Errors;
- (13) The Bond on Appeal;
- (14) The Notice of Lodgment of Statement of testimony, together with the acknowledgement of service thereof on defendant;
- (15) The Order of the court directing the exhibits to be transmitted on appeal to the Circuit Court of Appeals, for the Ninth Circuit;

- (16) This Praeipe, together with acknowledgement of service thereof on defendant;
 - (17) The Citation on Appeal, with proof of service thereof on defendant;
 - (18) An Index to all of the above;
 - (19) Third Amended Answer to the Amended Complaint.
 - (20) Plaintiff's Demurrer to Third Amended Answer.
 - (21) Opinion on the Demurrer to the Third Amended Answer.
 - (22) Order Overruling Demurrer to Third Amended Answer.
- all of the same to be duly certified under your hand and the seal of the above entitled court.

Dated Seattle, Washington, March 7th, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of the foregoing Praeipe received this 7th day of March, 1916.

BOGLE, GRAVES MERRITT & BOGLE,
Attorneys for Defendant.

Indorsed: Praeipe for record on appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Plaintiff,

vs

Northwestern Commercial Company, a corporation, Defendant.
Defendant's Praeipe for Record on Appeal.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

In addition to the record on appeal requested by plaintiff in its praecipe heretofore filed herein, you will please prepare for the record on appeal the following additional portions of the record in said cause, to wit:

1. Defendant's first amended answer to original complaint.
2. Plaintiff's motion to strike the first affirmative defense of the said amended answer, filed on the 24th day of February, 1913.
3. Order denying said motion to strike said first affirmative defense, entered on the 26th day of March, 1914.
4. Opinion of Neterer, District Judge, denying said motion to strike said first affirmative defense, filed March 25, 1914.
5. Motion to recall Citation.

6. Order denying motion to recall Citation.

These additional portions of the record are required by the Defendant to complete the record on appeal in said cause.

Dated: Seattle, Washington, March 11, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

Copy of the foregoing praecipe for additional portions of the record required by defendant received this 11th day of March, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Service of within Defts. Praecipe this 11th day of March, 1916, and receipt of a copy thereof, admitted.

WILLIAM H. GORHAM,
Attorney for Appellant.

Indorsed: Defendant's Praecipe for Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 11, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

No. 2117.

Maine Northwestern Development Company, a corporation,
Appellant,

vs.

Northwestern Commercial Company, a corporation, Appellee.
Certificate of Clerk of United States District Court, Western District of Washington, to Transcript of Record.

United States of America, Western District of Washington, ss

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing printed pages, numbered 1 to 208, inclusive, to be a full, true, correct and complete copy of the record and proceedings in the above entitled cause as is called for by the praecipe of the appellant and by the praecipe of the appellee, as the same remain of record and on file in the office of the Clerk of said Court and that said printed pages together with the original exhibits, separately certified, constitute the record on appeal from the final judgment of the United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California:

I further certify the following to be a true, full and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making the record.

certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's Fee (Sec. 828 R. S. U. S.) for making record, certificate or return 920 folios at 15c.....	\$138.00
Certificate of Clerk to transcript of record—4 folios at 15c .....	.60
Seal to said Certificate .....	.20
Certificate of Clerk to original exhibits—3 folios at 15c..	.45
Seal to said Certificate .....	.20
Statement of cost of printing said transcript, collected and paid	151.11
	<hr/>
	\$290.56

I hereby further certify that the above cost for preparing, certifying and printing said record amounting to \$. has been paid me by William H. Gorham, Esq., Attorney for Appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued on appeal in said cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the Western District of Washington, at Seattle, in said District, this 28th day of March, 1916.

FRANK L. CROSBY,

(Seal)

Clerk, U. S. District Court.

In the United States Circuit Court of Appeals for the Ninth Circuit.
No. 2117.

Maine Northwestern Development Company, a corporation,
Appellant,

vs

Northwestern Commercial Company, a corporation, Appellee.

THE UNITED STATES OF AMERICA,

to the

NORTHWESTERN COMMERCIAL COMPANY,
a corporation, the above named appellee:

CITATION.

A GREETING:

You are hereby notified that in a certain action in the United States District Court in and for the Western District of Washington, Northern Division, wherein the Maine Northwestern Development Company is plaintiff and the Northwestern Commercial Company is defendant; and wherein an equitable defense was interposed by

answer, an appeal has been allowed the plaintiff therein to the United States Circuit Court of Appeals, for the Ninth Circuit;

And you are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, thirty days after the date of this citation, to show cause, if any there be, why judgment appealed from should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable Jeremiah Neterer, Judge for the United States District Court, for the Western District of Washington, Northern Division, this 8th day of March, 1916.

JEREMIAH NETERER,
United States District Judge for the
Western District of Washington,
Northern Division.

Received a copy of the above and foregoing Citation this 8th day of March, 1916.

BOGLE, GRAVES, MERRITT, & BOGLE,
Attorneys for the Northwestern
Commercial Company, the
above named appellee.

Indorsed: No. 2117. United States Circuit Court of Appeals, Ninth Circuit. Maine Northwestern Development Company, Appellant, vs. Northwestern Commercial Company, Appellee. CITATION. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 9, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. William H. Gorham, Attorney for Appellant.

In the United States
Circuit Court of Appeals

For the Ninth Circuit

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a Corporation,

Appellant,

VS.

NORTHWESTERN COMMERCIAL COMPANY,
a Corporation,

Appellee.

BRIEF ON MOTION TO DISMISS APPEAL FOR
WANT OF JURISDICTION.

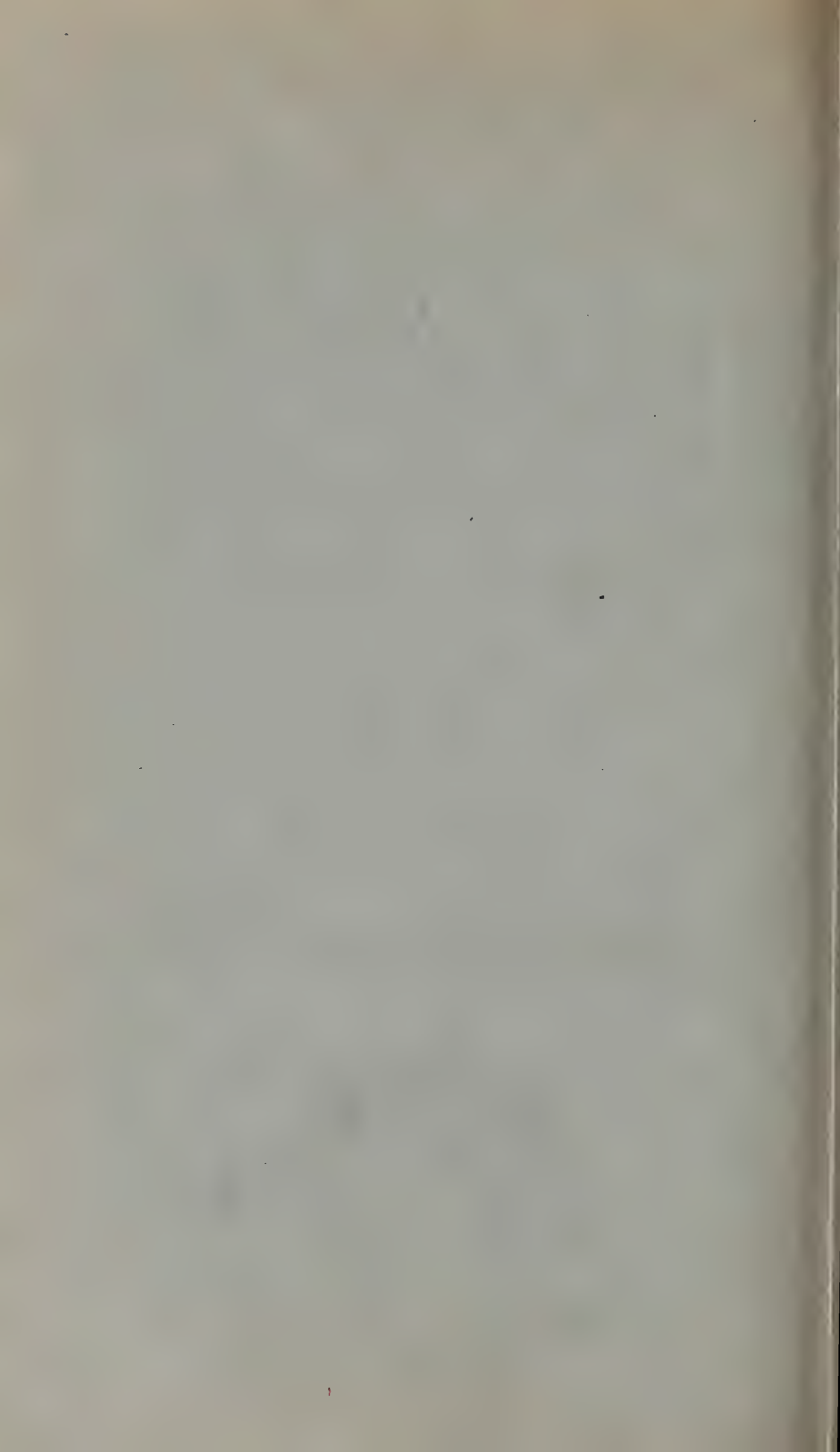
Filed

APR - 7 1916

F. D. Menckton,

^{Clerk,}
Seattle, Washington.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,



No.....

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY,
a Corporation,

Appellee.

BRIEF ON MOTION TO DISMISS APPEAL FOR
WANT OF JURISDICTION.

This is an action at law commenced by the appellant, plaintiff below, in the District Court of the United States, for the Western District of Washington, in March, 1912, to recover from the defendant and appellee the sum of \$125,000, alleged to be due to the plaintiff and appellant from the defendant upon

an alleged agreement of subscription for preferred shares of stock in the plaintiff company. The subscription agreement is attached as an exhibit to the complaint, and was signed in the name of the defendant company, by John Rosene, president. An amended complaint was filed in the case on July 30, 1915, and an amended answer to this complaint was filed in September, 1915. The case came on for trial in December, 1915, and resulted in a verdict of the jury in favor of the defendant, and judgment was accordingly entered on December 5, 1915. No bill of exceptions was ever settled nor writ of error taken out from this court, the plaintiff seeking a review by appeal under the Act of Congress of March 3, 1915, upon the theory that an equitable defense was interposed by the amended answer. The act of March 3, 1915, provides that "the review of the judgment or decree entered in such case shall be regulated by rule of the court." So far as we have been able to ascertain, no rule of court has been adopted regulating the procedure in taking an appeal to review an action at law.

I.

There was no equitable defense interposed in this action. The original complaint was filed in March, 1912. The amended complaint, filed July 30, 1915, alleges that the plaintiff corporation was incorporated expressly for the purpose, among others, of purchasing

from Rosene certain mining claims and water rights in Alaska, to be paid for by the issuance of \$3,750,000 par value of its common stock, and \$245,000 in cash. It further alleges that the plaintiff was incorporated March 17, 1906, and that it purchased from Rosene these mining claims and water rights on March 20, 1906, and issued its common shares of stock therefor, and thereafter paid Rosene the sum of \$245,000 in cash. The subscription sued on is alleged to have been made by Rosene on behalf of this defendant for the preferred stock of the defendant company on April 4, 1906.

The first affirmative defense in the amended answer to the amended complaint, which is the defense claimed by appellant to be an equitable defense, alleges in substance as follows: That the John Rosene mentioned in the amended complaint was one of the promoters and the managing director of the plaintiff; that he had entered into certain contracts with certain other promoters of the plaintiff, and with the plaintiff, whereby it was agreed, among other things, that said Rosene and his associate promoters would organize plaintiff corporation; that said Rosene and certain other persons were the owners of the said mining claims, which said claims were alleged to have been of little value and which they were desirous of selling, and it was agreed between said Rosene and his associate owners of said mining property and the other

promoters of the plaintiff corporation that when said corporation was organized, the said mining property would be conveyed to said Rosene by the other parties interested therein, and that said Rosene would thereupon convey said mining property to the plaintiff corporation, and should be paid therefor, in full payment for said property, the sum of \$245,000; that \$1,250,000, par value of the capital stock of plaintiff corporation, known as common stock, should be issued to Rosene, ostensibly as a part payment for said property, but in reality as a bonus and gift to said Rosene and the other promoters of plaintiff corporation; that it was further understood and agreed and was a part of the same arrangement that Rosene would provide the money, to-wit, the \$245,000, to be paid to himself for said mining property, by subscribing for preferred shares of the plaintiff corporation on behalf of this defendant, to the amount of \$250,000, and that the money realized on such subscription should and would be appropriated by the plaintiff company to the payment to said Rosene of said \$245,000; and it is alleged that said subscription, on behalf of the defendant referred to in the complaint, was made by Rosene and accepted by the plaintiff company pursuant to this agreement and understanding by him with said plaintiff and its promoters, and in furtherance thereof and of his own personal interests and of those of said other promoters, and not otherwise.

It is further alleged that after the organization of the plaintiff corporation, it and its officers and directors had full knowledge of these facts, understandings and agreements, and that plaintiff became a party thereto; that said subscription on behalf of this defendant was accepted by the plaintiff with full knowledge of all these facts, and that pursuant to said agreement the said common stock of plaintiff was issued by plaintiff to said Rosene and his co-promoters.

It is further alleged that this defendant did not authorize nor approve said subscription, and was ignorant of the secret understandings, agreements and interests of said Rosene until it acquired knowledge thereof during the years 1910 or 1911.

It is further alleged that at a meeting of the Board of Trustees of the defendant company in April, 1906, at which said Rosene was present, when said defendant was first notified that said Rosene had made said alleged subscription, the Board of Trustees immediately repudiated the same, and verbal notice thereof was immediately thereafter given to the plaintiff corporation through its president and treasurer.

It is further alleged in the defense that the defendant, on various other occasions thereafter, whenever the matter of this subscription was mentioned or brought before it, consistently and persistently repudiated the same and disclaimed any liability thereunder.

The defense further alleges that Rosene did convey the mining claims to the plaintiff, pursuant to the agreements and understandings above set out, and that Rosene, without the knowledge or consent of the defendant, caused moneys of the defendant, aggregating \$125,000, to be turned over to the plaintiff on said alleged subscription, and that the plaintiff, pursuant to said understandings and agreements, turned over said money, or a large part thereof, to the said Rosene.

It will be noticed that this plea alleges that when Rosene signed the subscription agreement on behalf of this defendant, on April 4, 1906, he was (a) president of the defendant company; (b) promoter and managing director of the plaintiff company; (c) vendor of the mining claims to plaintiff and as such a personal creditor of the plaintiff in the sum of \$245,000, which plaintiff agreed to pay out of this subscription; (d) party to a conspiracy with his associate promoters to secure \$1,250,000 of the common stock of the plaintiff without consideration to plaintiff therefor; and (e) party to an agreement with the promoters of the plaintiff, and with the plaintiff itself, that he would make this subscription on behalf of this defendant in order to provide the money with which plaintiff was to make payment to him for the mining claims conveyed by him to it.

The defendant is a Washington corporation, and under the laws of that state, the corporate powers of

the corporation must be exercised by the Board of Trustees (2 Rem. & Bal. Code, §3680). Rosene, therefore, clearly had no authority to make this subscription on behalf of the defendant without authorization from its Board. The plea alleges that no such authority had been given. Consequently the subscription was not binding upon the defendant unless it ratified or adopted Rosene's unauthorized contract. The plea in question, however, expressly alleges that the defendant not only did not authorize or ratify or adopt the unauthorized contract, but on the contrary, immediately repudiated it, as soon as it had knowledge that Rosene had attempted to make it. We cannot understand on what theory the defense, in this aspect of it, can be regarded as an equitable defense. If A, without authority, enters into a contract on behalf of B, with a third person, the contract has no binding effect whatever. *A fortiori*, if B. seasonsably repudiates it, it has no legal existence or binding force. That, in substance, is the case here as alleged in this special defense.

We are not now dealing with the question of the sufficiency of the defense, nor testing it under a demurrer. It may be that the facts alleged could have been proven under the general issue and that they amount merely to the plea of *non est factum*. The sole question here is whether the defense is equitable, not whether it is sufficient or well pleaded. It was deemed

good pleading to set out the repudiation and the facts which gave defendant the right to repudiate the contract, even though the facts might have been admissible under the general issue.

Cummins vs. Boyd, 83 Pa. St., 372.

If Rosene, simply as president of the defendant company, could be held to have implied power or authority to enter into this contract on its behalf, the facts pleaded show such relationship by him to the other party to the contract and such an interest in the subject matter of the contract adverse to his principal as to disqualify him from acting in this matter as the agent of or on behalf of this defendant. We believe the rule is universal, that an agent will not be permitted to contract on behalf of his principal in a matter wherein his personal interest is adverse to his principal, unless the principal, with full knowledge of his interest and relations, sees fit to approve or ratify the contract; in other words, a contract made by an agent, which otherwise would be within the scope of his authority, is not binding upon the principal without adoption or ratification after full knowledge, where the agent has a personal interest in the subject-matter of the contract adverse to the principal. We are not now concerned with the question of an innocent third party, because the plea alleges that plaintiff had full knowledge of all the facts.

Whether such a contract is absolutely void or merely voidable is immaterial, because considering it as voidable, it becomes a nullity upon prompt and timely repudiation by the principal.

“The right of a principal to refuse to be bound by a transaction in which the agent assuming to represent him has an adverse interest is unconditional. It is immaterial whether the transaction was fair to the principal or not. The incapacity of the agent to act in a case of this kind results from an *implied limitation of the authority delegated by the principal*, and this limitation is implied in all cases because sound policy obviously demands that an agent should never be led into the temptation of placing his interest in conflict with his duty. In many cases it would be impossible to ascertain whether the agent did or did not obtain the best terms for the principal which it was possible to obtain; but the principal would always have the privilege of adopting the contract made on his behalf if he should desire, and ratification usually would be implied in a case of this kind upon a failure to dissent.”

1 *Mor. on Corp.*, §522.

This doctrine was recognized by this court in *Cowell vs. McMillan*, 177 Fed. 25, as founded on good morals and sound public policy. The principle was also recognized and applied in *Mooney vs. Mooney Co.*, 71 Wash., 258. In *Parsons vs. Co.*, 25 Wash., —, the court carried the doctrine to the extreme by holding that a trustee of a Washington corporation was so far disqualified by adverse interest that he could not be counted as present for the purpose of making a quorum of the Board, and that any action of the Board, when there was no quorum without counting him, was void.

In *Twin Lake Oil Co. vs. Marbury*, 91 U. S., 587, the corporation executed a note and mortgage to a director. The court held that the corporation could have rescinded or avoided the contract simply because of the relation of the payee of the note and mortgage to the corporation, if it had seen fit to do so promptly. It further held that as the corporation executed the note and mortgage, they were not void but voidable; and inasmuch as the director in that case had acted openly, in good faith, and with the full knowledge of the corporation, and the corporation had received and used the money advanced on the note, it was estopped thereafter to repudiate.

A case similar in principle to the one at bar is that of *City of Findlay vs. Perts*, 66 Fed., 427. In that case one B, who was agent for P. & S. for the sale of gas machines, entered the employ of the city as superintendent of its gas works, and as such superintendent in the city's name ordered from P. & S. certain gas machines, upon which he received from P. & S. a commission of \$10.00 upon each machine. The city officials had no knowledge of such commission and double agency. The machines were received by the city and installed and used and part of the price paid. Afterwards, when learning of the double agency of the superintendent, the city gave notice of repudiation of the contract of purchase and offered to return the machines, but did not, in fact, reship them. Action

was brought at law by P. & S. against the city for the balance of the purchase price. The answer set up the facts above stated as a defense. Judge Lurton, in delivering the opinion for the Circuit Court of Appeals, says:

“Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law.”

“Such agreements are a fraud upon the principal which entitle him to avoid a contract made through such agency. * * * Where there are a principal, an agent and a third party contracting with the principal and cognizant of the agent’s employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, then the principal, on discovering this, has the option of rescinding the contract altogether. *Wald’s Pol. Cont.*, 247.”

The learned judge pointed out the difference between the effect of the double agency upon the contract between the third party and the agent for the reward, and its effect upon the contract between the third party and the principal—holding that the principal, upon discovery of the facts, might either repudiate or affirm the contract. He further held that if the principal repudiated the contract and his repudiation was timely, the third party could not recover against him, either at law or in equity. In that case the trial court held that the city, by retaining the gas machines, had waived its right to repudiate the contract. The Circuit Court

of Appeals reversed the case and remanded it with instructions to submit the question of the sufficiency of the repudiation of the contract to the jury.

That case is direct authority for the proposition that a contract made by the agent for his principal, when the agent is adversely interested, may be repudiated by the principal, and that upon a suit at law by a third party against the principal on the contract, the defense showing the adverse interest of the agent and timely repudiation is a legal defense and not equitable.

In the case of *Pac. Lbr. Co. vs. Moffett*, 134 Fed. 836, a similar defense at law was sustained.

As above stated, in many of the cases it is held that the adverse interest of the agent disqualifies him from acting in that matter on behalf of his principal, even though the matter otherwise would be within the scope of his agency; and that where the third party has notice of the adverse interest of the agent, that is notice of lack of authority on the part of the agent to enter into the contract. (I. Mor. on Corp., Sec. 524.)

Story on Agency, Section 210.

II Corpus Juris, Section 519, and cases there cited.

Dowden vs. Cryder, 55 N. J. L., 329.

O'Meara vs. Lawrence, 141 N. W., 312.

Park Hotel Co. vs. Bank, 86 Fed., 742.

National Bank vs. Bank, 95 Fed., 87.

Christy vs. Foster, 61 Fed., 551.

In 10 Cyc., 912, the rule is thus stated:

“Subject to exceptions in favor of innocent parties, the general rule is that acts of officers of a corporation in any transaction in which both the corporation and they themselves individually are interested, do not bind the corporation.”

Thus, in *Glover vs. Ames*, 8 Fed., 351, it was held that on a sale made by an agent who had a personal interest adverse to his principal, which was known to the purchaser, no title passed; and in *Clafflin vs. F. & C. Bank*, 25 N. Y., 293, a note executed by the officer of the bank, payable to himself, was held to be void, the fact that the officer was payee being notice to the world that his interest was adverse to the principal for whom he was undertaking to act. In the case at bar, actual knowledge of the adverse interest of the agent is alleged.

The same rule is applied in *National Bank vs. Munger*, 95 Fed., 87, and in *Stephens vs. Gall*, 179 Fed., 938.

In Meechem on Agency, section 66, the rule is stated as follows:

“A person will not be permitted to take upon himself the character of an agent where on account of his relation to others or on account of his own personal interest, he would be compelled to assume incompatible and inconsistent duties and obligations. An agent owes to the principal a loyal adherence to his interests, and it would be a fraud upon the principal and would contravene the public policy to permit an agent, without the full knowledge and consent of his principal, to enter into a relation involving such a duty when his allegiance had already been pledged to one having

adverse interests or when his own personal interests would be antagonistic to those of his principal."

In the case at bar, the plea in substance shows that the execution of this subscription contract by Rosene was part of a scheme and conspiracy entered into between Rosene and his associates, and the plaintiff itself, for the purpose of getting the moneys of the defendant to pay Rosene for his mining property. Manifestly, Rosene, being the vendor of mining claims of little value (as alleged in the pleading), but which he was selling for \$245,000, was not in a position to give the defendant the benefit of his sound judgment as to the advisability of subscribing to stock in the plaintiff corporation, when the fruits of such subscription constituted the only means of securing payment for his mining claims. The very money which was to be realized on that subscription was part of the reward expected to be reaped by Rosene as a result of the consummation of the scheme.

It has been the contention of appellant that this was an equitable defense within the principle applied by this court in the case of *Hill vs. N. P. Ry. Co.*, 113 Fed., 914, and *Standard Portland Cement Corporation vs. Evans*, 205 Fed., 1. In these cases this court has held that where a contract is executed understandingly and intentionally, but the party was induced to enter into the contract by false or fraudulent representations, the defense on that ground is not available at law.

Those cases are not applicable to the defense presented in the case at bar. Where the contract sued upon was understandingly and intentionally executed by the party being sued, it may well be that only equity has jurisdiction to annul and set aside such contract because of collateral fraud practiced upon the defendant as an inducement to move him to execute the contract. In the case at bar, however, under the facts pleaded in this defense, the contract was never executed by the defendant either understandingly or otherwise. It was executed by Rosene, who had neither express nor implied authority from the defendant to bind it by such a contract, and who is alleged to have executed the contract as a part of a general scheme entered into with the plaintiff to defraud the defendant.

Aside from the fact that Rosene had no authority to execute the contract on behalf of the defendant, and therefore the contract never had any existence in fact, it is apparent that the fraud in this transaction was not a mere inducement for the company to execute the contract, but was a fraud inherent in the execution itself, and the case in that phase should be governed by the principle announced in *Insurance Co. vs. Bailey*, 13 Wall., 616. In that case the Insurance Company issued two policies on the life of Albert Bailey. After Bailey's death, the beneficiary brought suit upon the policies. The Insurance Company thereupon filed a bill in equity against the beneficiary under the policies, alleging that

the policies had been procured by the defendant by fraudulent suppression of material facts and misrepresentations of other material facts. It was alleged and evidence given tending to prove that while both Bailey and the beneficiary represented to the company that he was in good health, the fact was that he was suffering from a disease which proved fatal within a short time after the policies were issued, and that both Bailey and the beneficiary had been advised by his physician that he could not live more than six months. The court held that this was a defense available at law, and for that reason dismissed the suit in equity.

In *Life Insurance Company vs. Bangs*, 103 U. S., 780, suit had been brought upon a life insurance policy and a judgment obtained thereon. A bill was thereupon filed by the insurance company against the plaintiff in the judgment, seeking to enjoin its execution, upon the ground that the policy had been procured from the insurance company for the purpose of robbing that company, and by misrepresentations and fraud. It charged a conspiracy between the assured and his wife and son to take out this insurance, the insured intending shortly thereafter to commit suicide, which in fact he did, and charging that the beneficiaries in the policy had aided him in so doing. The court held that these facts were available as a defense at law in the suit upon the policy and the defense not having been made in that action, equity was without jurisdiction to enjoin the judgment.

See also *Buzard vs. Houston*, 119 U. S., 347.

That fraud is one of the subjects of concurrent jurisdiction in courts of law and courts of equity, is elementary. In such cases where an action at law has already been commenced and the fraud is of the character cognizable at law, a court of equity has no jurisdiction and the defense must be made in the action at law. Equity will interfere only where something more than mere defense is sought, as where full protection to the defendant requires injunctive relief or the cancellation of some instrument or some other distinctly equitable relief. (I. Pom. Jur., Sec. 179.)

Under the facts alleged in the plea in this case, the fraud was inherent in the very execution of the contract, in that the agent in the act of signing the contract on behalf of the defendant was carrying out and consummating the pernicious agreement made with plaintiff. As stated by Judge Lurton in the case of *City vs. Pertz*, 66 Fed., 427, 435:

“The conflict created between duty and interest is utterly vicious, unspeakably pernicious and an unmixed evil. Justice, morality and public policy unite in condemning such contracts and no court will tolerate any suit for their enforcement.”

To permit a recovery, under such circumstances, would be against all sound principles of law and morals and against public policy.

In *Hartshorn vs. Day*, 19 How., 211, which is the

leading case announcing the principle contended for by appellant, the court stated that "fraud in the execution of an instrument has always been admitted in a court of law, as where it has been mis-read or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence." Where a party secretly pays or agrees to pay an agent compensation or reward for signing the principal's name to a contract, knowing that the agent has no authority from the principal to sign such a contract, it seems too clear for argument that the signature of the principal is secured by fraud or imposition, within the rule stated in the *Hartshorn* case.

It is also beyond dispute that where a contract is voidable at the election of one of the parties, his repudiation and disaffirmance of the contract and notice thereof to the other party puts an end to the contract for all purposes, and no action can be obtained thereon thereafter either in law or equity.

It also seems to be beyond question under the authorities that where a contract made by an agent is voidable as to his principal, because of the relation of the agent to the other party or his adverse interest, the principal may repudiate or rescind the contract simply by notification to the other party that he repudiates or disaffirms it. Of course, if he has received anything

under the contract, he is required to return or tender a return of it. In this case the defendant had received nothing under the contract. The complaint did allege that defendant had made payment of part of the subscription and had received certain shares of stock thereon. The defendant, in the general denials in its answer, denied these allegations.

If the subscription contract was not absolutely void *ab initio* because of lack of authority in Rosene to make the subscription, there can be no question under the authorities that this adverse interest of Rosene, coupled with his relations to both corporations, made a contract entered into by him on behalf of the defendant with the plaintiff, at most, a voidable contract with respect to the defendant, and the timely repudiation of the contract by the defendant put an end to the contract entirely.

“A lawful rescission of an agreement by mutual consent, or from the action of one party alone, where by reason of fraud, duress or other legal ground for rescission the right is vested in him to elect to abrogate the contract, puts an end to it for all purposes.”

Davis vs. Bronson, 50 N. W., 836.

“Where the defrauded party repudiates the contract, he can thereafter resist the enforcement of the contract, not only in a court of equity, but also in a court of law.”

6 Rul. Cas. Law, Sec. 52.

“By rescission, the contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken.

6 R. C. L., Sec. 323.

Whitman Ag. Co. vs. Hornbrook, 55 N. E., 502.

14 Am. & Eng. Ency. Law, p. 158.

In any view of the case, the facts pleaded show a right in defendant to rescind the contract, and timely exercise of that right by defendant before this action was brought. Such a defense is legal, not equitable, and the case is not reviewable by appeal.

Respectfully submitted,

W. H. BOGLE,

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Attorneys for Appellee.

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United States
Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN
DEVELOPMENT COM-
PANY, a corporation,

Appellant,

vs.

NORTHWESTERN COMMER-
CIAL COMPANY, a corpora-
tion,

Appellee.

No. 2773

**Appellant's Brief on Motion to Dismiss
the Appeal.**

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United States
Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN
DEVELOPMENT COM-
PANY, a corporation,

Appellant,

vs.

NORTHWESTERN COMMER-
CIAL COMPANY, a corpora-
tion,

Appellee.

No.-----

**Appellant's Brief on Motion to Dismiss
the Appeal.**

This is a legal action to recover the amount due from appellee, defendant below, on its stock-subscription to preferred capital stock of appellant, plaintiff below, under certain assessments or calls made by plaintiff.

The pleadings which finally framed the issues on which this action was tried are:

The Amended Complaint (Record, p. 17).

The Amended Answer to the Amended Complaint (Record, p. 23).

The Reply (Record, p. 32).

This explanation is necessary because other previous pleadings are inserted in the record under the praecipes of appellee and appellant, anticipating the motion to dismiss the appeal, and the parties being desirous of showing by the record that the question raised by the motion to dismiss was raised in the court below and of further showing the opinions and rulings of the trial court on the question so raised.

On the pleadings as finally settled, the defendant's amended answer (Record, p. 23) denies the material allegations of the amended complaint (Record, p. 17), and, for a first affirmative defense, alleges in substance as set forth in defendant's opening brief at pages 3, 4, 5 and 6.

A trial was had on the issues as finally settled, resulting in a verdict and judgment in favor of defendant from which plaintiff appeals under the provisions of Act of Congress, approved March 3, 1915, ch. 90, 38

Stat. L. 956, amending Section 274b of the Judicial Code.

Defendant now moves to dismiss the appeal on the grounds:

1. That this court is without jurisdiction of this appeal.
2. That no equitable defense is interposed in defendant's answer.

DEFENDANT'S POINTS AND AUTHORITIES.

The contention of defendant is that the defense set up in the first affirmative defense, to-wit: (1) Want of authority in the agent executing the contract on behalf of defendant; (2) timely disapproval of contract when knowledge of its execution was brought home to defendant; (3) timely notice to plaintiff of such disapproval; (4) fraud in the breach by the agent (Rosen) of the fiduciary relation existing at time of contract between agent and defendant; (5) knowledge at time of contract by plaintiff of that fraud; constitutes a legal not an equitable defense.

And in support of that contention it argues:

I.

That if A without authority enters into a contract

on behalf of B with a third person, it does not bind B; *a fortiori*, if B seasonably repudiates the contract, it has no legal existence. "That in substance (they contend) is the case here as alleged in the first affirmative defense." (Brief, p. 7).

If that were all that was alleged in the defense, we would concede the defense a legal one amounting to a plea of *non est factum*.

II.

Defendant contends that by reason of plaintiff's alleged knowledge of the alleged fraud on defendant, at the time of contract, the contract, whether void or merely voidable, becomes a nullity upon timely repudiation (Brief, p. 9). And cites

Mor. on Corp., Sec. 522;

Cowell v. McMillan, 177 Fed. 25;

City of Findlay v. Pertz, 66 Fed. 427.

to support the proposition that the defrauded principal has a right to refuse to be bound by a transaction in which its agent has an adverse interest and *City of Findlay v. Pertz*, *supra*, to the effect that a defense on such premises is a legal defense and not equitable.

We concede the right of a defrauded principal to repudiate a contract made by its agent having an adverse interest, but do not concede such a defense to be legal.

It is true that the case of *City of Findlay v. Pertz, supra*, was an action at law and the pleading, under the Ohio Code practice, was a petition, answer, and reply, and that the answer contained affirmative defense alleging the plaintiff had illegally and fraudulently procured one who was their secret agent and who was an agent and officer of the City of Findlay to procure for them the contract in question.

It is also the fact that the trial judge took from the jury all consideration of the defenses presented by the municipality. It does not appear from the report of the case that the question as to whether the defenses were legal or equitable, was raised; but the appellate court found error in the trial court not submitting to the jury the question of ratification of the contract and reversed the judgment.

In the cited case of *Pac. Lbr. Co. v. Moffett*, 134 Fed. 836, it appears that an effort was made by an agent to defraud his principal by causing the principal to pay the debt of another—the contract devised for this purpose was held to be fraudulent and *void*, and never took effect. All of which is good law but not to the point involved in the motion to dismiss this appeal.

III.

Defendant further contends that when plaintiff has notice of adverse interest of defendant's agent, Ro-

sene, that in itself is notice of lack of authority on part of agent to bind his principal (Brief, p. 12), and cites text writers and cases in support thereof.

But these authorities do not touch the question under consideration here: When is a defense legal and when equitable?

In *Hotel v. Bank*, 86 Fed. 742, cited, an action on a promissory note, the court held the note as a contract made with himself by an agent on behalf of his principal, to be *void* and without consideration, *ultra vires* of the corporation, which it could not ratify and had no power to estop itself from denying. The defense was a general denial, and averred that the transaction was one between its president, individually, and the Bank of which it had no knowledge and to which it never assented. No question of equitable defense was involved.

Bank v. Munger, 95 Fed. 87, cited, was a suit to recover from the Bank a balance of money deposited to account and has no application to the matter under discussion.

In *Chrystie v. Foster*, 61 Fed. 551, cited, a suit by a receiver of a bank to recover a deposit, it was held that unless expressly authorized to do so the president of a bank could not use the funds of the bank to pay his personal obligations; and there being no proof

of such express authority, the authorization given him by defendants was not a defense to the claim.

Neither do the other authorities cited on pages 12 and 13 of their Brief, bear on the question as to whether the fraud alleged in the first affirmative defense constitutes a legal or equitable defense.

IV.

Defendant further contends (Brief, p. 15) that *Hill v. N. P. Ry. Co.*, 113 Fed. 914, and *Standard Portland Cement Corporation v. Evans*, 205 Fed. 1, are not applicable to the defense presented in the case at bar for the reason that the subscription was never executed by defendant either understandingly (as was the case in cases cited) or otherwise; that it was executed by Rosene as a part of a general scheme entered into with the plaintiff to defraud defendant; that the fraud alleged was not a mere inducement for the company to execute the contract but a fraud inherent in the contract itself, and cites *Insurance Co. v. Bailey*, 13 Wall. 616, a suit in equity to cancel insurance policies after death of the insured, on the ground that the policies were obtained by fraudulent misrepresentation and fraudulent suppression of material facts; where the court, in affirming a dismissal of the bill, found the obligations to pay under the policies were a purely legal demand, and the remedy afforded the insurer,

perfect and complete, was their right to make a defense at law and held that when the cause of action is a "purely legal demand" and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in the federal courts.

To the same effect, *Buzard v. Houston*, 119 U. S. 347, is cited.

The case of *Insurance Co. v. Bailey* is distinguishable from the case at bar in this.

There the allegations of fraudulent misrepresentations and fraudulent suppression of material facts in securing the policies to be issued were held to be available in a legal defense.

Such representations are in the nature of warranties on the part of the insured and proof of the falsity of which would relieve the insurer of any obligation under the policy by vitiating it *ab initio*; hence such proof would be available in a defense at law.

In *Buzard v. Houston*, *supra*, which was a suit in equity for rescission and cancellation of an assignment of contract on the ground of fraud and for damages, the court held that the bill stated a case for which an action of deceit could be maintained at law and which would afford full, adequate and complete remedy at law.

In the recent case of *American Sign Co. v Electro, etc., Sign Co.*, 211 Fed. 196, Van Fleet, J., distinguished the cases of *George v. Tate*, 102 U. S. 564, and *Hartshorn v. Day*, 19 How. 211, both involving specialties, and where fraud as a defense was held only available in equity, and the case of *Buzard v. Houston*, 119 U. S. 347, involving a simple contract to pay money, where fraud was held available in an action at law, and maintains that the Supreme Court has not yet decided that fraud was not available as a defense in an action at law in the federal courts on a simple contract to pay money.

But he cites Judge Taft, in *Wagner v. Ins. Co.*, 90 Fed. 395, to the effect:

Of course, cases may be conceived where the avoiding of a release may concern the rights of others not parties, or may involve the application of peculiarly equitable doctrines of confidential relations, and the like, and thus present issues which only a chancellor with his flexible procedure and careful discrimination, can properly adjust and decide. In such cases the parties can be remitted to equity.

The case at bar is one on a subscription contract where the subscriber contracts with the corporation and with the several subscribers to its stock to take and pay for the stock subscribed and the defense set up is that of a breach by the president of defendant of the

fiduciary relations between that officer and the defendant.

This brings the case within the exception to the rule announced in *Wagner v. Ins. Co.*, *supra*, for here the avoiding the subscription concerns the rights of others not parties, and involves the application of peculiarly equitable doctrines of confidential relations and the like and thus presents issues which only the chancellor with his flexible procedure and careful discrimination can properly adjust and decide.

The U. S. Supreme Court by its decisions in *Insurance Co. v. Bailey*, *supra*; *Insurance v. Bangs*, 103 U. S. 780, and *Buzard v. Houston*, *supra*, has not overruled *George v. Tate*, 102 U. S. 364 or *Hartshorn v. Day*, 19 How. 211, and the rule laid down in these latter cases still controls and has been followed by inferior federal courts in similar cases, down to and including *Standard Portland Cement Corp. v. Evans*, *supra*, by this court.

Defendant, referring to *Hartshorn v. Day*, *supra*, as the leading case announcing the principles contended for by plaintiff, that "fraud in the execution of an instrument has always been admitted in a court of law, as where it has been mis-read or some fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence," would draw an analogy between an instrument so procured and where a party secretly pays or agrees to pay an agent compensation for signing the principal's name to a contract, knowing the agent has no such authority from the principal to sign such a contract.

The fraud or imposition practiced, in procuring the signature of the party to be bound, refers to misapprehension on the part of the party to be bound as

to what is signed. In the case at bar the signature was affixed by the agent on behalf of the principal with full knowledge of the contents and import of the instrument.

Further, in *Standard Portland Cement Corp. v. Evans, supra*, the corporation's assent to the execution of the notes, it was alleged by way of defense, was procured by fraud and that one of the corporation's officers in executing the notes was influenced by fraudulent motives, and yet in that case the defense was held to be an equitable one.

Lastly, defendant agrees (Brief, p. 19), that, if the subscription was not void *ab initio* because of lack of authority in Rosene to sign for defendant, there can be no question that the adverse interest of Rosene coupled with his relations to both corporations, made at most a voidable contract with respect to defendant and that the timely repudiation by defendant put an end to it entirely.

But as we shall discuss further on the alleged disapproval was in 1906 and the discovery of the alleged fraud is stated in the plea to have been four or five years later; and, as the alleged disapproval was not based on fraud, the tender of the issue of fraud in the plea, in addition to the allegation of disapproval, constitutes an equitable defense within the rule laid down

in *George v. State, supra*, and *Hartshorn v. Day, supra*.

PLAINTIFF'S POINTS AND AUTHORITIES.

I.

This first affirmative defense under consideration contains two separate and complete defenses.

(1st) Want of authority on the part of said Rosene to execute the subscription in suit on behalf of defendant; disapproval of the subscription by defendant's trustees in April, 1906, immediately upon being notified thereof; and verbal notice of such disapproval to plaintiff soon thereafter.

(2nd) Acts on the part of Rosene, occupying a fiduciary relation to defendant, in connection with the organization of plaintiff and with his execution of the subscription constituting a breach of that fiduciary relation; all of which were at all times known to plaintiff and all of which were unknown to defendant until the year 1910 or 1911.

It will be observed from the pleading that the alleged fraud was not discovered by defendant until 1910 or 1911 and therefore could not have been the basis of disapproval of the subscription by defendant's trustees in April, 1906. The alleged disapproval followed as a consequence of defendant's trustees being informed by Rosene of the subscription being made by him on be-

half of defendant and their decision to have none of it.

The issues thus tendered in the first affirmative defense are:

(1) Want of authority, disapproval, and notice of such disapproval to defendant in April, 1906, a legal defense.

(2) Breach on Rosene's part of the fiduciary relation between Rosene and defendant known to plaintiff, unknown to plaintiff until 1910 or 1911, an equitable defense.

Upon issues joined, the defendant was at liberty to introduce evidence to support both or either of the issues so tendered by it; but no act constituting a breach of Rosene's fiduciary relation could support the allegations of the legal defense because the alleged disapproval was made by defendant without knowledge of the alleged fraud according to the express allegations of this first affirmative defense; that alleged disapproval was not based on any fraudulent acts but on want of authority in Rosene and the alleged exercise of a legal right on part of defendant's trustees to determine for defendant whether or not they would invest defendant's funds in the preferred stock of plaintiff.

Any defense by defendant put forward now, based on allegations of fraud arising from a breach by Rosene of fiduciary relations existing at the time of con-

tract between Rosene and defendant, known to plaintiff, must be *in addition* to any defense based on a disapproval at or about the time of contract without knowledge of such fraud.

The affirmative defense of want of authority and disapproval serve no function additional to the general denials of the amended answer to the amended complaint; and the proof to be offered in support of the latter would be all sufficient to support the former; that defense is still the defense of *non est factum* contained in the general denials of the amended answer.

The allegations of fraud on the part of Rosene, in this first affirmative defense, in making the subscription, of knowledge of that fraud on the part of plaintiff at all times and of want of knowledge of that fraud on the part of defendant, constitutes a defense by way of confession and avoidance; confessing the subscription and seeking to avoid it on the ground of fraud not discovered until 1910 or 1911, one or two years prior to the commencement of this action.

This *confession, per se*, precludes any element of fraud entering into the execution of that instrument itself, necessary to bring it into the classification of fraud heretofore cognizable on the law side of the court; and the avoidance, acts of overreaching and improper conduct, breaches on Rosene's part of the fiduciary re-

lations existing between Rosene and defendant, alleged to have at all times been known to plaintiff and unknown until 1910 or 1911 to defendant, brings the defense of fraud squarely within that classification heretofore cognizable only in equity.

Simkins' A Federal Suit at Law, p. 44.

The federal courts have heretofore made a distinction between cases where the execution of a written instrument has been obtained by trick or fraud to which the assent of the party executing it was not given intentionally and cases where the instrument has been executed intentionally and understandingly but where the mind of the party has been affected and assent secured by means of false representations and deceit; in the former cases holding the instrument void, to be disregarded where the plea in defense is *non est factum*; while in the latter cases the instrument is held to be only voidable at option of maker and effect must be given to it as a valid instrument until it is annulled by a judicial decree in a direct proceeding for the purpose.

Hill v. N. P. Ry. Co., 104 Fed. 754.

Hartshorn v. Day, 19 How. 211;

George v. Tate, 102 U. S. 564;

Ry. Co. v. Harris, 158 U. S. 326.

This court reviewed *Hill v. N. P. Ry Co.*, in 113

Fed. 914 and found it "unnecessary to decide whether the question of fraud leading up to and inducing the execution of such instruments may be inquired into and determined in an action at law in a federal court" and affirmed the judgment on other grounds.

In *Levi v. Matthews*, 145 Fed. 152, Circuit Court of Appeals, 4th Circuit, the rule we contend for, that an allegation of fraud inducing the contract, contained in the answer, states an equitable defense, is upheld.

In *Pac. Mut. Life Ins. Co. v. Webb*, 157 Fed. 155, Circuit Court of Appeal, 8th Circuit, which was an action on a life insurance policy when the defendant company pleaded accord and satisfaction and execution of written release which plaintiff in her reply denied and sought to avoid the release on the ground that it was procured by fraud, deceit and misrepresentation of facts, the court, upon the question of what fraud was available in an action at law in a federal court to avoid a formally executed release, after reviewing *Hartshorn v. Day*, 19 How. 211; *George v. Tate*, 102 U. S. 564; *Ry Co. v. Harris*, 158 U. S. 326; *Ry. Co. v. Dashiell*, 198 U. S. 521, said (p. 157):

"The conclusion from all the cases in the Supreme Court is that the only fraud which may be availed of in an action at law to avoid a formally executed release of the claim sued on, is misrepresentation, deceit, or trickery practiced to induce the execution of a release which the signer never intended to execute and upon

which the minds of the contracting parties never met, and does not include any of those misrepresentations of fact which may be resorted to in order to persuade the claimant to agree to the release as actually made."

In *George v. Tate*, 102 U. S. 564, an action at law, error was assigned in the refusal of the court to permit evidence to be given, of fraud by the defendant in error in procuring from the plaintiffs in error the bond upon which the judgment below was recorded. The court, through Mr. Justice Swayne, said:

* * * "2. Proof of fraudulent representations by Meyers & Greene, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give."

Citing

Hartshorn v. Day, 17 How. 211;

Osterhout v. Shoemaker, 3 Hill 513;

Belden v. Davies, 2 Hall 433;

Franchot v. Leach, 5 Cow. 506.

And in *Standard Portland Cement Corp. v. Evans*, 205 Fed. 1, which was an action at law to recover on promissory notes of the corporation and in which the corporation, as defendant, filed an answer denying some of the allegations of the complaint and setting up new matter by way of an affirmative defense alleging

the execution of the notes was induced by means of a conspiracy and scheme to defraud the corporation and that there was want of legal consideration for their execution, this court said:

“In brief, the substance of the affirmative defenses is, first, that the sale of the bonds and stock and the execution of the notes therefor were fraudulently procured, and the whole transaction was the outcome of a fraudulent conspiracy between Howard, Dingee, and Bachman to foist upon plaintiff in error (the defendant corporation) worthless bonds and stocks of a corporation in which it had no interest, and for which bonds it was to pay the full par value; and second, that although the resolution of the board of directors of the plaintiff in error (the defendant corporation) authorizing the transaction was adopted by the requisite number to constitute a quorum, Dingee, owing to his personal interest adverse to the corporation, was disqualified to act as a director, and without his presence there was not a quorum.

“The matter so pleaded requires the aid of a court of equity to give it effect, and is not available as a defense in an action at law in a federal court. The facts alleged do not show that the notes were not executed by the corporation, or that the execution thereof was procured by any trick or fraud, so as to render them void, and thus present a defense that might be made under a plea of *non est factum*. They show that the notes were executed understandingly and intentionally, but that the assent of the plaintiff in error to the execution of the same was procured by fraud and deceit, and that the action of one of the officers of the plaintiff in error was influenced by fraudulent motives. These allegations, if true, present equitable defenses. The distinction between these two classes of defenses is clear and is well established by the decisions *George v.*

Tate, 102 U. S. 564; *Burnes v. Scott*, 117 U. S. 582; *Hill v. Northern Pac. Ry. Co.*, 113 Fed. 914; *Levi v. Matthews*, 145 Fed. 152; *Heck v. Missouri Pac. Ry. Co.*, 147 Fed. 775; *Pac. Mut. Life Ins. Co. v. Webb*, 157 Fed. 155; *Cook v. Fidelity and Deposit Co.*, 167 Fed. 95; *Union Pac. R. Co. v. Whitney*, 198 Fed. 784."

Thus, prior to March 3, 1915, the rule had become well established in the federal courts that fraud inducing contract (not touching the physical execution of the instrument itself) constituted an equitable defense not available in actions at law.

Our contention is that the subscription contract even under the allegations of the first affirmative defense was not void but only voidable and this appellee's counsel seem to concede in their Brief at page 9, adding that it becomes a nullity upon prompt and timely repudiation by the principal. And the cases cited by counsel in their Brief undoubtedly sustain that position.

This line of argument however, is beside the question.

If defendant promptly repudiated an unauthorized contract made in its behalf, no recovery could be had on that contract by the other party thereto.

The questions raised by the motion to dismiss are:

1st. Do the allegations in the first affirmative defence of fraud constitute an equitable defense?

2nd. Would knowledge by plaintiff, at the time of contract, of the fraud, change such defense from an equitable to a legal defense?

Standard Portland Cement Corp. v. Evans, supra, answers the first of the questions in the affirmative and the second question in the negative.

II.

The defendant, in its amended answer to the amended complaint (Record, p. 23) sets out what was not contained in its former pleadings, a *fifth* affirmative defense, wherein it alleges (Record, p. 27) :

1. That plaintiff was promoted and organized by John Rosene, A. A. Housman and L. H. French and their associates, under R. S. Maine, 1904.

2. That the promoters in order to secure for themselves and others common stock of plaintiff as a bonus and gift and without payment of any money to plaintiff therefor or receipt by plaintiff of any property, services or other thing of value as a consideration for the issuance of its common stock and contrary to laws and public policy of State of Maine entered into a scheme or device to that end as follows:

Rosene and French and other associates of theirs owned certain properties in amended complaint mentioned which they agreed, with said other promoters,

to sell to plaintiff when organized, for sum of \$245,000; And it was arranged and agreed by owners and promoters and by officers and directors of plaintiff (when organized) that said property should be conveyed to plaintiff and that the ostensible consideration to be stated in documents and resolutions would be \$245,000 in cash and \$3,750,000 par value of common stock being all of plaintiff's authorized common stock, although the real consideration would be \$245,000 in money; that this cash consideration, \$245,000 should be paid by plaintiff to Rosene for owners of the properties; that the \$3,750,000 common stock should be issued to A. A. Housman & Co. by plaintiff and that A. A. Housman & Co. should deliver \$1,250,000 to Rosene, French and A. A. Housman, as a bonus or gift to them as promoters of plaintiff; and remainder of common stock, \$2,500,000, should be delivered by A. A. Housman & Co. to subscribers to preferred stock, of plaintiff, from time to time as such subscriptions were obtained and paid; which scheme or device was well known to officers and directors of plaintiff and was by their cooperation carried out and the common stock referred to in amended complaint which plaintiff avers it is ready and offers to deliver to defendant is a part of said \$2,500,000 common stock so illegally issued to

A. A. Housman & Co. pursuant to said scheme and device.

3. That the common stock was issued by plaintiff to A. A. Housman & Co. and was never issued or delivered to vendors of said property.

4. That said property was of little, if any, real value and was not considered by vendors nor by plaintiff nor its officers and directors as having either actual or speculative value in excess of \$245,000, cash paid therefor, and was not at any time valued by plaintiff or by its directors in good faith, in exercise of their honest judgment in excess of \$245,000.

5. That directors of plaintiff, at time of issuance or authorizing issuance of said stock and purchase of said properties had been selected and were controlled by Rosene, French and Housman and acted in their interest and under their control and had no knowledge of said property or its value, and if they pretended to make any valuation of it they acted wholly under the direction and control and in interest of said promoters and exercised no independent judgment and did not in fact make any bona fide valuation of said property.

6. That plaintiff has never had under its ownership or control so as to be able to issue or cause to be

issued to defendant, in performance of subscription contract, any shares of its common stock for which the par value has been paid in money, or labor or property received, either of an actual value equal to not less than par or at a valuation not less than par made in good faith by plaintiff's directors, but that all common stock proposed and offered in said amended complaint to be issued to defendant under said subscription has been or will be illegally issued under and pursuant to said fraudulent scheme and device and for no consideration to plaintiff or else for alleged labor or property at a valuation by plaintiff's directors not fixed in good faith and known by plaintiff and its directors to be excessive or beyond any fair valuation of such labor or property.

Here we have a separate defense alleging a fraudulent scheme or device to illegally issue, without consideration, all of the authorized common stock of plaintiff, one third of which was to be delivered to Rosene and his associate promoters, as a bonus and gift, and two-thirds of which was to be held in trust for the benefit of subscribers to plaintiff's preferred stock; and that plaintiff was unable to issue or cause to be issued to defendant any shares of plaintiff's common stock in accordance with the subscription contract, which had been legally issued full paid; and that the common stock

proposed to be issued to defendant under the subscription has been or will be illegally issued under said fraudulent scheme or device, all contrary to the laws and public policy of the state of plaintiff's domicile, and in fraud of preferred stockholders to be, including defendant.

Here again, under a separate defense, defendant tenders an issue of fraud constituting, under the rule in *George v. Tate, supra* and *Standard Portland Cement Corp. v. Evans, supra*, an equitable defense.

Upon this defense defendant might rely to defeat recovery, assuming its general denials did not avail it and assuming that it failed to establish by competent evidence all other affirmative defenses.

III.

The question of fraud as alleged in the amended answer to amended complaint constituting an equitable defense was previously raised in this case prior to March 3, 1915, where the amended answer to the complaint (Record, p. 3) contained similar allegations of fraud; and plaintiff moved against it by a motion to strike on the ground that such allegations constituted an equitable defense, and the trial court denying the motion to strike held that "to waive such a defense on the ground that it was a matter for equitable cognizance alone would be to make a court of law a potent agency in the accomplishment of illegal and unlawful designs."

* * * "It would indeed be a harsh system of jurisprudence that would lend any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements which the other would abhor." (Record, pp. 8 and 9.)

But when to a third amended answer (Record, p. 11) containing a similar affirmative defense of fraud, plaintiff demurred on the ground that the affirmative matter was matter of purely equitable cognizance not properly pleadable in an action at law, the judge of the trial court in an opinion overruling the demurrer (Record, p. 15) said:

"I desire to refer to the language employed in the order denying a motion to strike parts of the affirmative defense, filed October 16, 1914, in which it was said that the 'matter being purely explanatory of the denials set forth in the defense and not being prejudicial.' I refer to this language for the reason that it is apparent from the argument before the bar and the language employed that some of the matters set forth in this answer in the several causes of defenses may prove to be purely matters of equitable defense, and if so, would have to be excluded upon the trial of the law action." (Record, pp. 15, 16.)

IV.

The Act of Congress, approved March 3, 1915, (38 Stat. L. 956, ch. 90) amending Section 274b of the Judicial Code so as to permit an equitable defense

by answer, plea, or replication, in actions at law, did not change the substantive law nor the distinction between law and equity; it did change the procedure which had prevailed since the judiciary act of 1789, by permitting an equitable defense to be interposed in actions at law; and provided that review of the judgment or decree in such case should be regulated by rule of court; and provided further as follows:

“Whether such review be sought by writ of error or by appeal the appellant court shall have power to render such judgment upon the records as law and justice shall require.”

The appellant’s counsel in December, 1915, caused inquiry to be made of the Clerk of the Supreme Court of the United States and of the Clerk of this Court as to any rule promulgated under the act above referred to and in each case the answer was that no such rule had been promulgated.

We submit:

1. That the first and fifth affirmative defenses of defendant’s amended answer to the amended complaint are equitable defenses.

2. That appellant, under the Act of March 3, 1915, *supra*, may seek a review of the judgment of the lower court by appeal.

3. That this court has jurisdiction to review on

appeal the judgment of the lower court in this action at law wherein equitable defenses were interposed in the lower court.

4. That the motion to dismiss should be denied.

Respectfully submitted,

WILLIAM H. GORHAM,

Attorney for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY,
a corporation,

Appellee.

No. 2773.

BRIEF OF APPELLANT.

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United States
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For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY,
a corporation,

Appellee.

No. 2773.

**BRIEF OF MAINE NORTHWESTERN
DEVELOPMENT COMPANY,
Appellant**

STATEMENT OF CASE.

This is an action at law by the Maine Northwestern Development Company, a corporation of the state of Maine, called herein the plaintiff, against the Northwestern Commercial Company, a corporation of the state of Washington, called herein the defendant, to recover on assessments or calls on defendant's subscription to plaintiff's preferred stock.

As a full and clear statement of the organization

of plaintiff is necessary to a proper understanding of the issues involved we will go at length into the matter.

Some time in December, 1905, one Leigh H. French interested John Rosene (then and until subsequent to October, 1907, president of defendant), in certain mining claims and water rights in Alaska (Test., Rosene, witness for defendant., Record pp. 136-137); and furnished Rosene reports of certain mining experts concerning the same (Id., p. 137); according to these reports there was not less than \$50,000,000 in gold locked up in the frozen ground of these mining claims (Id., p. 152); Rosene made inquiries as to the character of the experts (Id., p. 138), who were competent and reliable engineers (Id., p. 152); and Rosene at that time believed their statements as to values (Id., p. 152); \$245,000 was the price of the properties or mining claims (Id., p. 128), Rosene had interested A. A. Housman, a Mr. Myers and a Mr. Farquhar in the properties and a scheme to build and operate a railroad in connection with their development (Id., pp. 126-127); and it was agreed among them to organize a corporation to take over these properties and build the railroad;

One McConnell, owner of the mining claims and water rights, wanted cash on the sale; the Company

was not yet organized and had no funds and it was agreed that Myers should and he did pay \$25,000 for an option on half of the capital stock of the proposed corporation, Housman would take whatever Myers would not take, Farquhar \$250,000, Rosene \$250,000 for defendant, Housman \$50,000 for himself and Rosene \$50,000 for himself (Id., p. 129); Rosene insisted that Housman should not take any subscriptions until stockholders of defendant had been given an opportunity to take anything they wanted of it (Id., p. 130). A pool was made up to which Housman contributed \$50,000, Myers \$25,000, and Rosene \$50,000 (Id., p. 130); Rosene had already paid French \$20,000 on account of the purchase price of these claims in February (Id., p. 162); and the properties were conveyed to Rosene on or about March 15, 1906, by McConnell, having the record title, on the further payment on the purchase price to McConnell on that day of \$93,000 and delivery by Rosene of his personal note to McConnell for \$100,000.

Thereupon, on March 17, 1906, at the instance of Rosene and his associates, Housman, French, Myers and Farquhar, the plaintiff was incorporated under the name of Northwestern Development Company with its home office at Portland, Maine, with a capital stock of \$6,250,000 divided into two classes, to-

wit: one class, \$2,500,000 preferred stock, divided into 500,000 shares of the par value of \$5 each; and the other class, \$3,750,000 common stock, divided into 750,000 shares of the par value of \$5 each, expressly to carry on, among other, the following lawful business:

To purchase or otherwise acquire from John Rose one hundred and seventy-one certain mining claims and certain water rights in Alaska, and as payment therefor to issue and deliver \$3,750,000 par value of full paid and non-assessable shares in the common stock of the corporation and to pay the sum of \$245,000 in cash on the terms of an agreement to be authorized by its board of directors.

(Articles of Agreement, Subd. (a), Exhibit D4, Record p. 44.)

The preliminary organization of plaintiff was perfected on March 17, 1906, at a meeting of the signers of the Articles of Agreement at Portland, Maine, by adopting the Articles of Agreement as to corporate name and purposes, designating Portland, Cumberland County, State of Maine, as location of corporation, adopting a code of By-Laws, fixing the amount of capital stock, its kinds, and amount and par value of each kind, as above; and directing subscriptions to its capital stock to be opened;

Whereupon the original signers of the Articles

of Agreement subscribed to the capital stock as follows:

Jas. J. Hernan, for two shares; W. F. Crummett, for two shares; Geo. C. Ricker, for two shares; J. L. Brophy, for two shares; Clarence E. Eaton, for three shares.

Thereupon a board of five directors and a President, Vice President, Treasurer and Secretary were elected, the Treasurer authorized to receive further subscriptions to the capital stock; the president, treasurer and a majority of the directors authorized to prepare the certificate of organization or incorporation as required by the laws of state of Maine, to cause same to be examined and certified by the Attorney General of Maine and recorded in Registry of Deeds of Cumberland County, where corporation's business was to be done and file certified copy thereof in the office of Secretary of State of Maine.

(Min. meeting of Signers of Art. of Agreement, March 17, 1906, Ex. D5, Record, p. 44.)

The Code of By-Laws, among other things, provided:

No. 3. *Officers*: For a president, one or more vice presidents, a treasurer, one or more assistant treasurers, a secretary, a clerk and a board of five directors; (afterwards increased to nine directors)

No. 6. *Powers of Board of Directors*: That the property and business affairs of corporation shall be managed by the board of directors, who may exercise all such powers of the corporation as are not by law or by these by-laws required to be otherwise exercised.

No. 8. *Executive Committee*: For an executive

committee of three or more directors, to be designated by the board of directors, which committee shall have and may exercise all the powers of the board in the management of the business and affairs of the corporation.

No. 9. *Delegation of powers of directors:* That the board may delegate any of its powers to committees.

No. 25. *Issue of capital stock in payment of certain properties:* That the corporation may purchase from John Rosene 171 certain mining claims and certain water rights in Alaska and may issue and deliver in payment therefor \$3,750,000 common stock full paid and pay sum of \$245,000; all certificates issued for shares in capital stock shall contain an express reference to these by-laws and holder of any such shares by accepting any such certificate either before or after the purchase of said mining properties thereby consents and agrees that all said shares so issued in payment of such properties shall be or were issued fully paid by the sale and transfer thereof and are not liable to any further calls or assessments. And notice is hereby expressly given that all shares in the capital stock are issued and accepted upon the express understanding that there shall be no liability on part of incorporators, organizers or promoters of this corporation by reason of any fiduciary relation or because they have fixed the price payable by this corporation for said properties; And no contract or arrangement made on behalf of this corporation with any other corporation or any officer or director of this corporation shall be rendered void or voidable by reason of the fact that such officer or director of this corporation is interested in such contract. And it is understood and agreed that every present and future stockholder of this corporation assents to the terms, conditions and circumstances on

and in which said mining properties have been purchased and acquired by this corporation and the shares of stock of this corporation have been or are to be issued as aforesaid.

(Exhibit D6, Record, pp. 45, 49, 55.)

At the first meeting of the board of directors of plaintiff, held at Portland, March 19, 1906, the president, vice president, secretary and treasurer were elected; the certificate of organization of the corporation duly prepared and bearing the certificate of approval of the Attorney General of State of Maine and certificate of record of Register of Deeds of Cumberland County, Maine, and of the Secretary of State of Maine, was presented and placed on file; a corporate seal was adopted, an office of the corporation was, by resolution, established in the City of New York and meetings of its board of directors authorized to be held at the principal office of the corporation in Maine, or at such office in the City of New York or elsewhere as the board should from time to time order.

(Min. first meeting plttf's board of directors, March 19, 1906, Ex. D7, Record, p. 45.)

Thereafter, at the first annual meeting of plaintiff's stockholders held at Portland, on March 19, 1906, at which all of the shares in the captial stock of the corporation subscribed for, issued and outstanding were represented in person by the subscribers thereof, there was presented and ordered filed the Certificate of Organization of the corporation duly prepared and bearing the certificate as above stated; there were pre-

sented and approved and placed on file the following transfers of subscriptions to its capital stock:

Clarence E. Eaton to A. A. Housman for one share;

Jas. J. Hernan to Leigh H. French for one share;

Geo. C. Ricker to Henry C. Davis for one share;

W. F. Crummett to George Henderson for one share;

J. L. Brophy to Edward A. Pierce for one share.

A board of directors were thereupon elected as follows:

Directors: Housman, French, Davis, Henderson and Pierce; Clerk: Millard W. Baldwin.

(Min. first annual meeting pltff's stockholders, March 19, 1906, Ex. D8, Record, p. 45.)

On March 20, 1906, the balance of the original subscriptions to plaintiff's stock by the Signers of the Articles of Agreement, to-wit, the subscriptions of

Jas. J. Hernan, for one share;

W. F. Crummett, for one share;

Geo. C. Ricker, for one share;

J. L. Brophy, for one share;

Clarence E. Eaton, for two shares.

in all six shares, were transferred to John Rosene.

(Min.-book of pltff., 1906, page 40, Ex. E21, Record, p. 54).

Thereafter at the first meeting of the board of directors elected at the first annual meeting of plain-

tiff's stockholders, held at New York, on March 20, 1906, at which all directors were present, a president, 2nd vice president, secretary and treasurer were elected; the chairman announced that John Rosene had offered to sell to the plaintiff certain mining properties in Alaska in consideration of the issue to him of \$3,750,000 par value of full paid and non-assessable common shares in the capital stock of plaintiff and of the payment to him of \$245,000 in cash, in accordance with a proposed agreement to be entered into between Rosene and plaintiff, form of which was there presented, under which the certificates of said shares were to be issued as follows:

A. A. Housman, 1 share;
 Leigh H. French, 1 share;
 Henry C. Davis, 1 share;
 George Henderson, 1 share;
 Edward A. Pierce, 1 share;
 John Rosene, 749,995 shares;

which should include the shares subscribed for by said Eaton, Hernan, Ricker, Crummett and Brophy at the organization of the corporation and whose subscriptions had been by them assigned and transferred to said Housman, French, Davis, Henderson, Pierce and Rosene and said assignments accepted by them and the corporation, to which form of agreement was attached schedules of the mining claims and water rights proposed to be sold; and thereupon, upon motion, it

was unanimously voted that in the judgment of the board of directors said properties were necessary for the business of the corporation and the value as stated in said agreement, to-wit, \$3,995,000 was fair and reasonable; the proper officers of the corporation were authorized and directed on behalf of plaintiff to execute and deliver the said agreement between it and Rosene; the proper officers of the corporation upon the execution and delivery of the agreement and in accordance therewith, were authorized and directed to issue and deliver to order of Rosene 750,000 full paid non-assessable common shares of capital stock of plaintiff of the par value of \$5 each amounting to \$3,750,000 and to pay to Rosene \$245,000 in cash; an assessment was thereupon voted of 100 per cent to be levied upon the shares already subscribed as evidenced by the original subscriptions on file; and upon motion it was duly resolved that said properties be and they were accepted in full payment of the subscriptions for stock of the signers of the Articles of Agreement and the original subscribers to said stock, and that full paid stock be issued to them or their assigns to amount of their respective subscriptions upon execution and delivery of said Agreement and conveyance of said properties; the chairman then presented the form of a Supplemental Agreement proposed between Rosene and plaintiff relating to subscription at par for 500,000

preferred shares of its capital stock whereby, after reciting the said Agreement for the sale of said properties as executed and delivered for the consideration therein named, it was agreed that plaintiff should use its best endeavors to secure subscriptions at par to 500,000 shares of its preferred stock and that Rosene should deposit with A. A. Housman & Co., 500,000 shares in common stock at par and agreed that the same might be delivered at the rate of one share of common with each share of preferred stock paid for at par and that said common stock should be retained and applied by said depositaries for said purpose; upon motion the proper officers were authorized and directed to execute and deliver on behalf of plaintiff said Supplemental Agreement between plaintiff and Rosene; and an office of the corporation was established at New York City for board meetings, etc.

(Min. meetings of plttf's board of directors, March 20, 1906, Ex. D1, Record, p. 43).

At a meeting of plaintiff's board of directors held at New York on March 21, 1906, the forms of the preferred and common stock certificates were adopted; the treasurer announced the execution and delivery of the Agreement and Supplemental Agreement authorized by the board at its meeting of March 20, 1906, and the delivery by Rosene to plaintiff of a conveyance of

the mining properties, as provided in said Agreement; the number of directors were increased from 5 to 9 and Rosene, McLaren, Williams and Trenholme were elected to fill the vacancies thus created and Rosene and McLaren being present took their seats as members of the board; the matter of the appointment of an Executive Committee was discussed and no action taken being for the present deferred; McLaren was elected 1st vice president; Williams, 3rd vice president and Trenholme, assistant secretary; Rosene was appointed managing director with full power and authority to take charge of the operations of the company and was also elected chairman of the board; the managing director was authorized to have organized a railway company to be known as the Seward Peninsula Railway Company.

Min. meeting of plttf's board of directors, March 21, 1906, Ex. D2, Record, p. 43).

At a meeting of plaintiff's stockholders held at Portland on March 29, 1906, at which all of the capital stock of plaintiff subscribed for, issued and outstanding, to-wit; 11 shares, was represented, the board of directors was increased from 5 to 9 directors and the board authorized to fill vacancies thus created and the certificate required by law as to increase of board was directed to be filed with the Secretary of State of

Maine; and on motion all the acts and proceedings of directors at their meetings of March 20 and 21, 1906 as shown by the records of said meetings, including increase in number of directors and election to fill such vacancies were ratified, approved and confirmed.

(Ex. D9, Record 46, Min. of Stockholders, March 29, 1906).

And for the common stock of plaintiff covering the original subscriptions for 11 shares at the meeting of signers of Articles of Agreement, which as to 5 shares were transferred on March 19, 1906, and as to remaining 6 shares were transferred on March 20, 1906, as above, certificates of stock were issued as follows:

On March 20, 1906, to

Housman	.....Certificate No. G1, for 1 share
French	.....Certificate No. G2, for 1 share
Davis	.....Certificate No. G3, for 1 share
Henderson	.....Certificate No. G4, for 1 share
Pierce	.....Certificate No. G5, for 1 share

On March 21, 1906, to

McLaren	.....Certificate No. G6, for 1 share
Williams	.....Certificate No. G7, for 1 share
Trenholme	.....Certificate No. G8, for 1 share
Rosene	.....Certificate No. G9, for 3 shares

11 shares

(Transfer Book, Common, of plttf., Exhibits E11 to E14, Record, p. 57).

On March 30, 1906, the balance of the common stock was issued to Rosene in Certificate No. G10 for 749,989 shares; and on April 2, 1906, Certificate No. G10 for 749,989 shares common was surrendered and cancelled and in lieu thereof plaintiff issued common stock as follows:

To Rosene, Certificate No. G11, for 100,000 shares
 To Rosene, Certificate No. G12, for 80,000 shares
 To Rosene, Certificate No. G13, for 70,000 shares
 To A. A. Housman & Co., Certificate
 No. G14, for 499,989 shares
 (Id., p. 57).

All in accordance with the Agreement and Supplemental Agreement between plaintiff and Rosene, authorized by plaintiff's board of directors on March 20, 1906, as above set forth.

Agreeable to the understanding between Rosene and his associates in plaintiff corporation, Rosene mailed from San Francisco to A. A. Housman, treasurer of plaintiff, at New York, as an enclosure to the "Dear Arthur" letter of April 4, 1906, (Ex. E1, Record, p. 50) the subscription made by him on behalf of defendant, to \$250,000 of the preferred stock of plaintiff (Ex. E2, Record, p. 50).

Subsequently, in April, 1906, at a meeting of defendant's board of trustees, at Seattle, Rosene in person reported his action in thus subscribing on behalf

of defendant, and at the same time reported a payment by defendant to plaintiff on account of that subscription, of \$50,000. (Record, p. 72).

This payment of \$50,000 was entered in the Seattle journal and ledger of defendant, under date of April 30, 1906, as a credit to plaintiff's account and a debit to "Investment" account (Ex. K1, Record, p. 66); and was included in the item "capital assets, \$2,917,532.96" in defendant's Annual Report to its stockholders for year ending April 30, 1906 (Ex. N1, Record, p. 71-72).

Upon defendant's board of trustees receiving report from Rosene of said subscription, a discussion arose as to the authority of Rosene to so subscribe, all trustees except Rosene contending he had no such authority. Rosene asked the board as a matter of courtesy to him not to put anything on the minutes with reference to his subscription, stating that he would dispose of the subscription and the stock represented by that subscription, in a few days and then call the board together again, and the board acquiesced in his request. (Record, pp. 72, 94, 80, 104).

According to the contention of plaintiff, and it introduced positive evidence to support it, no motion or resolution affirming or disaffirming the subscription was carried or adopted by defendant's board at which

the subscription was reported but the board adjourned that meeting with the expectation of having the matter again come before it at a subsequent meeting (Record, p. 73); according to the positive evidence of defendant its board at that April meeting formally adopted a resolution disaffirming and repudiating that subscription. (Record, pp. 80, 93, 104).

But notwithstanding defendant's trustees were very much excited and afraid they were going to make a loss and, as it was a large amount, they did not want to take any chances (Record, p. 96), defendant made no record on its minutes of any motion or resolution, either in the official minute book or by way of any memorandum kept by the secretary; and their then attorney claims that his notes of the particular matter taken at that April meeting he threw away. (Record, p. 85).

What the defendant, through its board of trustees, actually did, is one of the issues of the case.

There is no contention on defendant's part that it made any demand on plaintiff at any time for a surrender and cancellation of the subscription; and that subscription was, in fact retained by plaintiff until offered in evidence at the trial of the case at bar. (Ex. E2, attached to Pierce's New York deposition, Record, pp. 50, 77).

As to the \$50,000 reported already paid by defendant on the subscription, Rosene was to dispose of the stock (represented by that subscription) and call the board together again (Test. Thomsen, Record, p. 72); Rosene would have the company relieved from what he had done and others would take the subscription; would return the \$50,000 to the treasurer which he had paid and the company would not have any obligation out (Test. Hartman, Record, p. 80); that Rosene would let the people who had subscribed in the east take the stock in their stead (Test. Treat, Record, p. 94); that Rosene was to sell—he was to reimburse them (defendant) even for the \$50,000—the amount was to be made good to the Commercial Company (Test. Trenholme, Record, p. 106).

Shortly after that April meeting the defendant's secretary met plaintiff's president, Mr. Henry C. Davis, partner of A. A. Housman & Co., and resident at New York, at the entrance of the Butler Hotel, Seattle, and they walked into the hotel and sat down and talked about the plaintiff and Davis asked about the trouble they were making for Rosene, what it was all about and defendant's secretary told him of the action of defendant's trustees with reference to that subscription. (Test. Trenholme, Record, p. 105).

The plaintiff's field of operation was in Alaska and

in the spring and summer of 1906 it was assembling at Seattle and shipping to Nome equipment and material for railway construction on the Seward Peninsula.

The defendant owned one corporation, the Northwestern Steamship Company, operating steamers between Seattle and Nome as a common carrier, another, the North Coast Lighterage Company, lightering cargoes from steamers at Nome roadstead; and another operating stores at Nome (Test. Treat, Record, p. 98).

The defendant acted as a clearing house for plaintiff at Seattle, disbursed all plaintiff's funds; and all of the funds that plaintiff spent at Nome during the season of 1906 in building the railway there were handled through defendant's account, that is their company's disbursements; when plaintiff at Nome ordered any money they drew on themselves at Seattle which draft was cashed by defendant at Seattle and defendant was reimbursed by drawing on plaintiff at New York; they carried all of plaintiff's freight that summer amounting to thousands of tons, it went forward prepaid and they always handled their business on a simple cash basis (Test. Trenholme, Record, p. 108); freight was prepaid in cash by plaintiff to N. W. Steamship Company that season in the sum ap-

proximately of \$174,000 (Exhibits AA and BB, Record, pp. 101, 102, 109).

Defendant was the clearing house for plaintiff, taking care of plaintiff's drafts and drawing on plaintiff at New York to cover itself (Test. Trenholme, Record, p. 118) crediting plaintiff and itself taking credit at its bank upon those drafts (Id., p. 118). At all times defendant did that right from the inception (Id., 118) approximate charges by defendant against plaintiff between April 18 and August 31, 1906, at least \$400,000 (Ex. K1, Id. 108). In October, 1906, a balance of account between plaintiff and defendant was struck, in favor of plaintiff in the sum of \$32,232.78 (Ex. K1), which was settled by defendant's check to plaintiff at Seattle (Record, p. 68).

While meetings of defendant's board were had between April and September of that year, the matter of the subscription did not again come before that board until September, 1906 (Record, pp. 73, 113).

In the meantime, Rosene not only did not dispose of the stock represented by defendant's subscription or of the subscription, or refund the \$50,000 paid in April on the subscription, but he gave written instructions to the auditor of defendant to credit plaintiff on account of the subscription the sum of \$25,000 (Exhibit 1, Record, pp. 68, 113-114), July 15th, 1906;

this amount was the 10 per cent of the subscription due on that date under its terms.

Trenholme, secretary of defendant, learned of this memorandum and the entries made pursuant to it before the September meeting of defendant's board (Record, p. 113-114); and notwithstanding he had supervision of the entire affairs of defendant (Record, p. 106) and though the plaintiff had a credit on defendant's books on July 15, 1906, of \$75,000 (Record, p. 114, Ex. K1) neither the credit to plaintiff on April 30th of \$50,000 nor the credit on July 15th of \$25,000, was charged back to plaintiff (Record, p. 115).

On September 5th, following, the matter again came before defendant's board. The minutes of that meeting read as follows:

The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed. And Mr. Thomsen introduced the following resolution: "Resolved that the president be authorized to subscribe to the stock of the Northwestern Development Company for this company in the sum of \$125,000." Mr. Thomsen moved the adoption of the above resolution and the same being seconded by Mr. A. J. Trimble, the same was put to a vote and unanimously carried. * * *

* * * The following resolution was introduced by Mr. Thomsen and seconded by Mr. A. J. Trimble and unanimously adopted, namely:

"Whereas, it is necessary to provide funds to build

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* * * The following resolution was introduced by Mr. Thomsen and seconded by Mr. A. J. Trimble and unanimously adopted, namely:

"Whereas, it is necessary to provide funds to build

and purchase additional steamers for the company's use;

"Resolved that the president be instructed to sell and dispose of the stock held by this company in the Northwestern Development Company down to fifty thousands dollars." (Exhibit H, Record, pp. 59, 94).

The subscription referred to in the minutes as being fully discussed was the subscription in suit (Record, p. 88).

But notwithstanding that Hartman, then attorney for defendant, present at that meeting and draftsman of the resolution "embodied what as a lawyer he thought carried out the transactions as it was transacted that day before the board, as he understood the action; that he put in every element that had any bearing on the question so far as he remembered it" (Record, p. 88), the action of the board was not a new or independent transaction; but was, on the part of defendant, a "compromise arrangement" (Record, pp. 90, 95).

As expressed by witnesses for defendant, present at that meeting: the board looked upon the subscription, they had gotten into a disagreeable frame of mind and they wanted finally to "give and take" and get out of it the best way they could (Record, p. 87); it was a disagreeable matter for them; that was the way they talked about it and they wanted to get out and be

relieved of the situation and the discussion and the embarrassment and the entanglement with as little loss as possible (Record, p. 88); a compromise arrangement believed to be for the interest of all the parties and was so stated and acted upon in that way when they voted on this resolution (Record, p. 90) a compromise arrangement (Record, p. 95); they decided to take \$125,000 of that subscription; that was what they decided to do; their books showed that they (plaintiff) had already been paid a certain sum on the subscription so they decided after discussing it very, very thoroughly that they would take \$125,000 (Record, p. 115); they wanted to close it up and make,—if they were going to do anything, they wanted to make a subscription for \$125,000 (Record, p. 116); as their then president, testifying as defendant's witness, expresses it:

“Well, I caused the Northwestern Commercial Company — money and property to be given to the Northwestern Development Company but without the Commercial Company's knowledge except my own personal knowledge in each instance and afterwards of course the directors of the Northwestern Commercial Company decided to ratify my acts that had been done unknown to them and unauthorized by them by my making this subscription.” (Record, p. 165); * * *

“In other words, the members of the board of the Commercial Company acquiesced in what I had

already done and expressed it in that form" (referring to resolution of Sept. 5) (Record, p. 169).

At the date of this meeting, September 5, but \$75,000 had been paid or credited plaintiff on the subscription; \$50,000 on April 30th and \$25,000 on July 15th; and the books of the defendant, which its then president Rosene states he has yet the first time to find any incorrectness in (Record, p. 168), show\$ that on September 5, the plaintiff was indebted to defendant in the sum of \$17,692. (Ex. K1), (Record, pp. 118-119).

And the defendant, at a time when it had theretofore credited plaintiff with the \$75,000 on the subscription in suit, not only as a "compromise," ratified the subscription in the sum of \$125,000 but at the same meeting directed the sale of the stock held by it in the plaintiff down to \$50,000. (Record, p. 59).

Subsequently defendant credited plaintiff on account of the subscription as follows: on Sept. 6th, 1906, \$25,000 and on Sept. 15th, 1906, \$25,000 (Record, p. 66, Ex. K1).

No subscription for \$125,000 of plaintiff's preferred stock was ever made by defendant or by any one in its behalf pursuant to the resolution of its board of Sept. 5th, or otherwise (Record, pp. 76, 170).

Subsequent to the September meeting of defendant's board and in the same month, Rosene, in New York City, orally reported to Davis, then president, Housman, then treasurer, and Henderson, then secretary, and all with himself, directors, of plaintiff, what had taken place at defendant's board meeting on Sept. 5th; that they (defendant's trustees) would have nothing to do with the subscription and that they repudiated it and that the only thing he had been able to do was to get them to take \$125,000 and that because it was forced on them, down their throats (Record, p. 168); but there was no meeting of plaintiff's board of directors which at that time consisted of nine directors (Record, p. 165), two of whom, Trenholme and Williams, appear never to have qualified—and there was no ratification at that or any other time by plaintiff or plaintiff's board of the "compromise" of defendant's board of September 5th, and no release by plaintiff or plaintiff's board of defendant from its liability on the subscription in suit.

There the matter rested until April 10, 1907, when defendant's board adopted the following resolutions, to-wit:

Resolved, That this corporation does hereby affirm its subscription to the capital stock of the Northwestern Development Company in the sum of \$125,000, par value, and no more, and the attorney of the com-

pany be and he is hereby authorized and directed and required to prepare the necessary notice to be sent by the secretary to the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription to the capital stock of that company was ever authorized in any sum whatever except the \$125,000. (Record, p. 107).

and pursuant to that resolution Hartman, then attorney for defendant on or about the same day submitted by letter a form of notice required by that resolution (Dfdt's Ex. 3, Record, p. 107).

On September 18th following at a meeting of defendant's executive committee the following resolutions were adopted, to-wit:

Upon motion, Resolved that this company's proxy be forwarded to Mr. S. W. Eccles to represent this company at a special stockholders' meeting of the Northwestern Development Company to be held at the office of said corporation at 281 St. John St., Portland, Maine, October 3, 1907, at 10 o'clock a. m., said proxy to be given with power of substitution.

* * *) Upon motion, Resolved that the treasurer of this company be instructed to have this company's stock in the Northwestern Development Company re-issued in the name of the Northwestern Commercial Company (Record, pp. 60, 61).

The 25,000 shares of plaintiff's preferred stock together with 25,000 shares of its common stock, represented by the \$125,000 paid by defendant, were delivered to and accepted by defendant—but the date of delivery is one of the issues of the case. That date

or the approximate date of such delivery is material for the reasons: first, as it is a circumstance tending to show whether or not there was a repudiation of the subscription in suit; second, because of the express reference to the charter and by-laws contained in the form of the plaintiff's stock certificate and notice thereof to defendant, and third, because the stock delivered to defendant was issued in the name of A. A. Housman & Company and, subsequent to its delivery to defendant, was represented at a meeting of plaintiff's stockholders at Portland, Maine, on January 23, 1907, at which meeting the acts of the incorporators, stockholders, directors and officers of plaintiff in the issue of shares of common stock were ratified and adopted as the valid acts of plaintiff and its stockholders (Ex. D10, Record, pp. 46, 49, 55).

In October, 1908, defendant's then president, Mr. W. R. Rust, received from plaintiff's then president, Mr. E. J. Mathews, a communication with enclosures attached showing the capitalization of plaintiff and the purchase by it from Rosene of the mining properties for \$245,000 cash and \$3,750,000 in common stock full paid (Rust's deposition, Record, p. 179).

Later in the same month, the two presidents discussed with each other the matter of the profits to plaintiff's promoters in the organization of plaintiff,

the issuance of \$3,750,000 common stock to Rosene and Rust then stated that of that amount \$2,500,000 was set aside as a bonus to subscribers to plaintiff's preferred stock and the other \$1,250,000 was a personal profit to Rosene and his associates (Record, p. 181).

At a meeting of plaintiff's stockholders at Portland on January 10, 1912, the corporate name of plaintiff was changed to Maine Northwestern Development Company (Ex. D11, Record, p. 47; Ex. D3, Record, pp. 44, 70); and at an adjourned meeting of its stockholders at Portland on January 15, 1912, it authorized a compliance with the laws of the state of Washington relative to foreign corporations doing business in that state; and levied assessments or calls upon the unpaid balance of subscriptions to its preferred stock (Ex. D14, Record, p. 47).

On January 19, 1912, plaintiff complied with the laws of state of Washington relative to foreign corporations doing business in that state and the State of Washington issued to plaintiff its license to do business therein (Ex. F. and F1, Record, pp. 56, 57).

On January 22, 1912, plaintiff's board of directors at Seattle levied similar assessments or calls

upon the unpaid balance of subscriptions to its preferred stock (Ex. S1, Record, p. 56); on March 1, 1912, at a meeting of plaintiff's stockholders at Portland, the acts of its stockholders on January 10th and 15th, 1912, and the acts of its board of directors on January 22, 1912, were duly ratified (Ex. D16, Record, p. 48).

Thirty days' notice of the assessments or calls, of the time and place where and to whom payable, was served upon defendant (Ex. S2, S3, T1-3, T4, Record, pp. 57, 62, 63) but defendant failed to pay the same.

On March 13th, 1912, after the assessments or calls on defendant's subscription had become delinquent, plaintiff's board of directors authorized its president to bring suit to collect the same (Ex. T5, Record, pp. 63, 124).

During the trial of the case at bar in the lower court plaintiff tendered defendant in court and deposited with the clerk of the trial court for benefit of defendant, 25,000 shares of its preferred and 25,000 shares of its common stock, full paid, with revenue stamps duly attached and cancelled.

The pleadings forming the issues in the case are: the amended complaint (Record p. 17),

the amended answer to amended complaint (Record p. 23),

the reply (Record p. 32),
and because of the particular affirmative defenses contained in the amended answer and the new matter by way of estoppel in the reply, a reference to them here will better serve a full consideration of the case than to attempt to summarize them.

SPECIFICATION OF ERRORS.

The errors asserted and intended to be urged are as follows:

First: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of a stipulation between the parties to said cause of date May 11, 1914, filed in the above entitled cause May 12, 1914, stipulating for the amendment of the pleadings, to which ruling plaintiff excepted and its exception was allowed by the court: (Second Assignment of Error).

Which stipulation, omitting the title of court and cause, was as follows:

It is hereby stipulated by and between the parties hereto:

1. That the plaintiff's complaint in the above entitled cause may be amended by adding to paragraph X of the original thereof on filed in the above entitled cause, as follows:

"That between the 4th day of April, 1906 and the

9th day of November, 1906, upon payment by defendant to plaintiff of said \$125,000, as aforesaid, plaintiff issued to defendant and defendant accepted therefor, 25,000 shares of said preferred stock."

2. That defendant's second amended answer heretofore served and filed in said cause, may be amended by adding to paragraph numbered I of the said second amended answer the following:

"except that defendant admits that between April 4, 1906 and November 9, 1906, plaintiff issued to and defendant accepted, 25,000 shares of the preferred capital stock of plaintiff for the \$125,000 which said John Rosene had paid out of the funds of this defendant; and defendant denies that any of said preferred stock was issued to or accepted by defendant otherwise than as hereinabove expressly admitted."

3. That in paragraph numbered I of the second affirmative defense in said second amended answer, the date, "1907" in the first line thereof, be changed to read "1906."

4. That said second amended answer as thus amended, shall be considered and stand as defendant's answer to said complaint as so amended.

Dated Seattle, Washington, May 11, 1914.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

(Second Assignment of Error.)

Second: Because the court erred in sustaining the objection of defendant to the introduction in evidence by plaintiff of the minutes of the meeting of the

Executive Committee of defendant of date October 23, 1907, including a resolution as follows:

“Be It Resolved: That Mr. Eccles be requested to call a meeting of the trustees at a very early date, for the purpose of asking for the resignation of President Rosine, or accepting the resignation of the balance of this committee,”

to which ruling plaintiff excepted and its exception was allowed by the court; (Third Assignment of Error).

Third: Because the court overruled the objection of the plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

Q. Did the Board of Trustees of defendant, Commercial Company, at any time ratify any subscription made by Mr. Rosine to the capital stock of the Development Company outside of the subscription authorized at that meeting of September 5, 1906? to which the witness answered: “They did not,” to which ruling plaintiff excepted and its exception was allowed by the court; (Sixth Assignment of Error).

Fourth: Because the court overruled the objection of plaintiff to the following question put by defendant to its own witness, J. D. Trenholme, on direct examination, to-wit:

Q. Did you notify him, or had he been notified, so far as you could tell from your conversation with him, of this action of the Board of Trustees of the defendant company?

to which the witness answered:

A. I met Mr. Davies at the entrance of the

Butler Hotel and we walked into the hotel and sat down there and began talking about the Development Company, and he asked me about the trouble that we are making for Mr. Rosine out here, and he asked me what it was all about and I told him. I told him of the action of our trustees with reference to his subscription. I told him of our action, of the trustees, with reference to this subscription of that \$250,000,

to which ruling the plaintiff excepted and its exception was allowed by the court. (Seventh Assignment of Error).

Fifth: Because the court erred in refusing to give the jury instruction No. 16, as requested by plaintiff, as follows:

“The plaintiff had the legal right to issue all of its common stock to John Rosine in part consideration of the conveyance by Rosine to it of certain mining properties and water rights, provided that all of its then stock subscribers and all of the holders of its capital stock then outstanding concurred therein; and if you find that all of plaintiff’s common stock was issued to John Rosine for such properties, with the concurrence of all then stock subscribers and all of the holders of its capital stock then outstanding, then I instruct you that such issue was legal; and if you further find that all of the four hundred and ninety-nine thousand, nine hundred and eighty-nine (499,989) shares thereof alleged by Plaintiff and admitted by Defendant as issued to A. A. Housman & Co. for the benefit of the subscribers to the preferred stock of Plaintiff, there was thereafter by said A. A. Housman & Co. assigned to and is now held by Plaintiff sufficient for Plaintiff to issue and deliver to Defendant one share thereof for each five dollars (\$5.00) paid on Defendant’s subscription; then I further in-

struct you that such issue and delivery by Plaintiff to Defendant would be in performance of Defendant's subscription. And I further instruct you that the validity of the issue of Plaintiff's common stock in part consideration for the conveyance by Rosine of said mining properties to the Plaintiff would not in the least be affected by the fact that Rosine was making a commission as promoter if that fact was known to all directors of Plaintiff and all of its then stock subscribers and all of the holders of its stock then outstanding and there was no objection made by any of them thereto,"

to which refusal plaintiff excepted and its exception was allowed by the court; (Eighth Assignment of Error).

Sixth: Because the evidence showed that the common stock of plaintiff company, fully paid, was legally issued for a valuable consideration and was delivered as follows: \$2,500,000, par value, as a bonus to the subscribers to the preferred stock of plaintiff company, \$1,250,000, par value, as a bonus to John Rosine and his associates, promoters of plaintiff company; (Ninth Assignment of Error).

Seventh: Because the evidence showed the fact that \$2,500,000, par value, of the common stock of plaintiff company, fully paid, was issued as a bonus to the subscribers to the preferred stock of plaintiff company, and the further fact that \$1,250,000, par value, of the common stock of plaintiff company, fully paid, was issued and delivered to John Rosine and his associates, promoters of plaintiff company, as a bonus, were known to defendant in the month of October, 1908, more than three years prior to the commencement of this action; (Tenth Assignment of Error).

Eighth: Because the evidence showed that the

defendant's president reported the subscription in suit and the payment of \$50,000 on account thereof out of defendant's funds, at a meeting of defendant's Board of Trustees held at Seattle within two weeks after the making of said subscription, and that upon receiving said report the defendant failed to repudiate the same, failed to notify plaintiff of any repudiation of same, and failed to place the plaintiff in *statu quo*; (Eleventh Assignment of Error).

Ninth: Because the evidence showed that at a time when defendant had acknowledged that \$75,000 of its funds had been paid to plaintiff to apply on account of the subscription in suit, to-wit: On September 5, 1906, it further ratified and confirmed said subscription by assuming to ratify and confirm it for the sum of \$125,000; (Twelfth Assignment of Error).

Tenth: Because the evidence showed that there was no compromise entered into between the parties releasing defendant from further claim of liability on said subscription, as alleged in the second Affirmative Defense of Defendant's Amended Answer to the Amended Complaint; (Thirteenth Assignment of Error).

Eleventh: Because the evidence showed that plaintiff at all times subsequent to its organization had under its ownership and control a sufficient amount of the common shares of its capital stock, legally issued, for a valuable consideration, to be able to issue common stock, full paid, to all the subscribers in the preferred shares, including defendant, in performance of its subscription contract and the subscription in suit; and that plaintiff tendered into court, for defendant's benefit, 25,000 shares of common stock of plaintiff, legally issued, for a valuable consideration, to comply with said subscription in suit; (Fourteenth Assignment of Error).

Twelfth: Because the evidence showed that the allegations of the amended complaint and of the reply were true, and that the allegations of the amended answer were not true; (Fifteenth Assignment of Error).

Thirteenth: Because the court erred in entering judgment that the plaintiff take nothing by this action, and that this defendant go hence without day and recover its costs; (Sixteenth Assignment of Error).

Fourteenth: Because the court erred in not entering a judgment for plaintiff against defendant in accordance with the prayer of the amended complaint; (Seventeenth Assignment of Error).

ARGUMENT.

The acts and proceedings of plaintiff's incorporators, stockholders and directors in the organization of their corporation, the purposes of its incorporation, its capitalization, classes of capital stock, amount and value of each class, its code of by-laws, the resolution of its board directing the purchase, and the purchase under that resolution, of the mining property, the issuance of \$3,750,000 common stock full paid and payment of \$245,000 to Rosene, as payment for the mining property, the deposit of \$2,500,000 of that common stock full paid with A. A. Housman & Company for the benefit of subscribers to preferred stock of plaintiff and the retention by Rosene as a bonus for himself and his associates, of \$1,250,000 of that

common stock full paid, the payment by Rosene on behalf of defendant of \$50,000 in April and of \$25,000 in July, 1906, on account of the subscription in suit, the levying of the assessments or calls and notice to defendant thereof are all matters of record and formal proof, and, together with the fact of the subscription in suit by Rosene on behalf of defendant and Rosene's report of that subscription and of the payment in April, 1906 of \$50,000 on account of the same, are all facts undisputed by defendant, except as to the bona fides of the valuation by plaintiff's directors of the mining property purchased from Rosene. The legal questions arising from these facts are in dispute.

The action of defendant's board of trustees, both at the April meeting when the subscription in suit was first reported by Rosene and at the meeting in the September following, when, after a discussion of the subscription in suit resolutions were adopted authorizing a subscription to plaintiff's preferred stock in the sum of \$125,000 and directing a disposal of the stock held by defendant in plaintiff down to \$50,000, is in dispute and the facts are only to be ascertained from defendant's records and the testimony of the former attorney and former trustees of defendant present at those meetings; of those present, all are

dead except Hartman, former attorney, and Thomsen, Treat, Trenholme and Rosene, former trustees; Rosene, though presiding at that April meeting and called as a witness by defendant was not interrogated as to the action of defendant's board at that April meeting, by defendant, and objection was made by defendant to plaintiff so interrogating him unless plaintiff made him its own witness; why plaintiff did not make him its own witness for the purpose of eliciting the facts with reference to that April meeting will be patent upon the most cursory reading of Rosene's testimony.

The testimony of Thomsen, for the plaintiff, and of Hartman, Treat and Trenholme, for the defendant, is in direct conflict so far as concerns the action of defendant's board at that April meeting.

POINTS AND AUTHORITIES.

I.

The subscription in suit, though its execution and delivery were brought home to defendant's board of trustees within a fortnight after such delivery, was not disaffirmed or repudiated by defendant and thereupon became a binding obligation on the part of defendant. (Fourth and Eighth Specifications of Error).

A repudiation of an unauthorized act of an agent,

by defendant to discredit Thomsen's testimony or to attack his credibility as a witness.

Hartman, former attorney, Treat and Trenholme, former treasurer and secretary and former trustees, of defendant, were called by defendant to explain their own actions as such former officers and attorney.

We are content, after making due allowance for the lapse of memory in the passage of time from 1906 to 1916, to rest the credibility or want of credibility of Hartman, Treat and Trenholme as witnesses, where it must rest, upon their own testimony as to what transpired at defendant's board meeting in September following and as to their reasons for the acts of the board at that meeting; and while it might be desirable to analyze that testimony concerning the September meeting for the purpose of demonstrating now the credibility of the witnesses upon this issue of disaffirmance at the April meeting it will be more orderly to allow it to develop itself when discussing, later in its proper place in this brief that September meeting.

If the resolution of repudiation was formally adopted that would dispose of the matter so far as the April meeting was concerned, except in so far as

such disposition was modified or changed by subsequent acts of defendant.

Assuming there was no such resolution formally adopted, was there such action on the part of defendant's board as was tantamount to the formal adoption of such resolution?

It appears that, at the April meeting, each trustee of defendant, except Rosene, there present, denied the authority of Rosene to bind the defendant by the subscription in suit, each trustee was opposed to having the subscription; but in view of Rosene's statements to that board and the board's acquiescence therein, that he would dispose of the subscription, of the stock represented by it and refund the money, it is fair to require evidence not only of a unison or assent of the minds of the majority of the board but evidence of the "so ordering it," to relieve defendant from liability on the subscription; and the evidence fails to show such "so ordering it."

Thompson, Corp., sec 5219. Note 5.

(b) *Notice of repudiation*: Trenholme, secretary and trustee of defendant, testifies: (A very short time after this April meeting) he met Mr. Davis, president of plaintiff, a member of the firm of A. A. Housman & Company, and a resident of New York, at the entrance of the Butler Hotel in Seattle and they

walked into the hotel and sat down there and began talking about the Development Company and Mr. Davis asked witness about the trouble that they were making for Rosene out here and what it was all about and witness told him of the action of their trustees with reference to the Rosene subscription of \$250,000 (Record, p. 105).

Hartman testified that H. C. Davis of New York, was the president of plaintiff at that time, a partner of A. A. Housman & Company; that he thought he saw Trenholme, defendant's secretary, talking with Mr. Davis with respect to this notice at different times when he was here in the summer of 1906; and it was witness' recollection also in the spring of 1907, Davis was around here quite a good deal for quite a good while (Record, p. 82).

The plaintiff's record shows that Rosene was its managing director with full power and authority to take charge of the operation of the company (Ex. D2, Record, p. 42); Rosene was the officer in charge of the operations of the company, mainly carried on at Seattle and Nome. It does not appear from the Record that Davis was present at any time in Seattle on the business of plaintiff or that he transacted, as such president, any business for the plaintiff at Seattle. His home and place of business, both as to the firm of

A. A. Housman & Company and as to the plaintiff was in New York City.

The general rule is that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to his principal. And as a corporation acts or is acted upon only through its officers, this rule applies with peculiar force to corporations.

Thompson, Corp., sec. 5189.

But this rule is subject to the exception, that where the president is totally disassociated from the company's business, as where he is on a journey, notice to him is not notice to the corporation.

10 Cyc. 1059.

We submit that the fourth specification of error is well taken.

(c) *The status quo*: The subscription had been delivered to plaintiff and \$50,000 had been paid on account of it, when it was reported with that payment to defendant's board; this amount was credited plaintiff and debited "Investment" account, on the books of defendant (Ex. K1); and was included in defendant's "capital assets" in its annual report for the year ending April 30, 1906, published by defendant to its stockholders; neither when the alleged resolution of

repudiation in April was adopted nor at any time thereafter were cross entries made on defendant's books debiting plaintiff's account and crediting "Investment" account with this item; the item of \$50,000 was allowed to remain as originally entered, for all time, and this, notwithstanding Trenholme, secretary of defendant, had supervision of the general affairs of his company and in a general way kept posted from time to time as to the state of the accounts between the company and other parties it was doing business with (Record, p. 106).

A redelivery of the subscription itself was not demanded of the plaintiff but it was allowed to remain in plaintiff's possession until produced in evidence by plaintiff at the trial in this action.

As to what was done about the \$50,000 paid at the time of the adoption of the alleged resolution of repudiation:

Trenholme testifies:

Mr. Rosene made the statement that if we did not want that investment he could readily take and sell the amount that he had subscribed for their company and he asked that we make no official record of that meeting for the reason that it might handicap him when he took the matter up again with his New York associates. (Record, p. 104).

* * * (Witness was asked: "What action was taken about that \$50,000; what was done about that,"

to which he answered): That Mr. Rosene was to sell that—he was to reimburse them, defendant, even for that \$50,000—that amount was to be made good to the Commercial Company. (Record, p. 106).

* * * Mr. Rosene was to dispose of the stock of this subscription and get us back even the \$50,000 that he had paid, they were to be reimbursed for that amount. (Record, p. 113).

Hartman testifies:

(After the alleged adoption of the resolution of repudiation) then Mr. Rosene pleaded with the board to not make a record of the matter in the record books because, he said, that even if the board did not think the property valuable, or the prospects valuable or the investment valuable, there was plenty of people who did, and he would have the Company entirely relieved from what he had done and others would take the entire subscription; would return the \$50,000 to the treasurer which he had paid and that the Company would not have any obligation out, and if a record was made and the matter was talked about it would lessen his chance of correcting the situation and relieving him from much embarrassment because he would make good by having others take the stock which had been set aside under that arrangement. (Record, p. 80).

* * * It (making a record of the resolution of repudiation) did not impress him of so much importance because of his belief that Mr. Rosene would be able to get the money back and relieve the Company entirely from what he had attempted to do; he believed that he (Rosene) would do it and it seemed like a mere formality and his (Rosene's) explanation was made and when he (Rosene) found they did not want to go on, he (Rosene) would have it placed in another way entirely. (Record, p. 85).

Treat testifies:

That everybody was in favor of it (resolution of repudiation) and it carried; Mr. Rosene then said that the stock had been oversubscribed in New York and it would be much easier for him and it would keep him in better standing with his associates, if they did not take any action that would reflect upon the subscription, and begged them not to do it and assured them that he would let the people who had subscribed in the east take the stock in their stead, and asked them for that reason to leave it off their record and not to make any permanent record of it, and they consented to it, thought that would be the simplest way out of it, so it was not put on the record. (Record, p. 94).

While it is true that where a corporation repudiates promptly the unauthorized act of its president and returns or tenders back its shares, it may maintain an action against the corporation whose stock has been subscribed, to recover what has been paid; in the case at bar the plaintiff manifested an intention to look to Rosene individually and not to the resolution of repudiation to relieve it of the situation and secure a refund of the money paid.

Defendant was acquiescing in Rosene acting as its agent in disposing of the subscription and stock under it and securing a refund of the money.

For it must be borne in mind that in defendant's board meeting, where Rosene was presiding, any assurance Rosene made to which the board assented, was made by Rosene as an individual or in his capacity of president of defendant, and not as an officer or agent of plaintiff; defendant's trustees were charged

with the knowledge that, as a matter of law, Rosene could not, while a member of and presiding at, defendant's board, act in an official capacity for, or bind, the plaintiff in transactions between the two corporations.

And in such acquiescence of defendant in Rosene acting as its agent in disposing of the subscription and the stock represented by it and in securing a refund of the money, instead of relying upon an absolute repudiation and the consequent right to recover the money from plaintiff, the defendant, in view of Rosene's statements, at the time, may have been moved by considerations of self-interest, a desire to shield its own reputation as a going business concern by shielding the reputation of its president; to protect its credit and standing by concealing any breach between its president and the balance of its board of trustees; fear of disturbing the pending negotiations with New York capitalists for the controlling interest in defendant, as evidenced by defendant's minutes, might have moved defendant to waive a repudiation of the subscription and to consent to look to Rosene to dispose of the matter.

Assuming the adoption of the resolution of repudiation, we have a repudiation which would relieve defendant from all liability and operate to give

the defendant a right to demand and recover of plaintiff the money theretofore paid; and then we have the further action on the part of the board consenting to look to Rosene to relieve them of the situation, to dispose of the subscription or stock represented by it and refund the money. The two actions are inconsistent and the latest adopted must govern the situation. Instead of an absolute repudiation, which in itself would relieve defendant, the defendant signifies that it does not want the investment and allows Rosene, its president, to dispose of it in a manner that its money will be refunded and it will be relieved from further liability.

Under such conditions the issuance and delivery of stock under the subscription would be subject to the order of defendant and plaintiff would, as a matter of law, be bound by the subscription in suit in its possession to deliver stock under it to defendant or order. The plaintiff was not placed in *statu quo*; it held defendant's subscription, still a valid and subsisting contract, the disposal of which was, by defendant's action entrusted to the latter's president.

The subscription, although made without authority of the trustees of defendant, having been partly executed by the payment of \$50,000, was not void but voidable.

A. & C. Coml. Co. v. Solner, 123 Fed. 855, 9th C. C. A.

And, as in the case of rescinding a contract for fraud, to rescind the subscription the parties must be placed in *statu quo*.

9 Cyc. 437 and cases.

For just and wise reasons the law gives to one who is induced by fraud to make a contract, the option upon discovery of the facts constituting the fraud, to rescind the contract and restore the consideration or to affirm it and recover the damages he has sustained. But it imposes upon him the imperative duty to exercise his option to release the party with whom he has contracted, to restore any consideration he has received which may be restored, and to place the parties as near as may be in *statu quo*, immediately upon discovery of the fraud, if he would rescind or avoid his contract. Nor does it permit him to speculate upon his option, to lie in ambush for years, until changes in the conditions or markets make his interest plain, before he makes his choice. Silence, delay, acquiescence or the use or retention of any of the fruits of the contract for any considerable length of time after discovery of fraud is in itself an exercise of the option and constitutes a complete and irrevocable ratification of the transaction. (Cases). This rule is peculiarly applicable to cases of the character here in question, where the property in controversy is stocks of mining and other like corporations which are speculative in character.

Wheeler v. McNeil, 101 Fed. 685.

If one who is induced to make a trade or sale by fraud would rescind it he must immediately upon his discovery of the fraud announce his intention so to do, and return all consideration he has received, to the end that the parties may be put in *statu quo* before sub-

sequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence or the retention or use of any of the fruits of the sale or trade that are capable of restoration for any considerable length of time after the discovery of fraud, constitute a complete and irrevocable ratification of the transaction.

Stuart v. Hayden, 72 Fed. 402, 8th C. C. A.

We submit that each of the three elements necessary to a repudiation of the subscription was lacking in the case at bar; that there was no action of the board, as such, on the subscription; that even conceding such action, there was no notice to plaintiff; and even conceding such action and notice, the plaintiff was not placed in *statu quo*; and that it necessarily follows, even conceding for the sake of argument that Rosene was without authority in the first instance to make the subscription on behalf of defendant, that the subscription was given validity by the failure of defendant to affirm or disaffirm promptly on knowledge of the subscription being brought home to it; such failure was in law an acquiescence in the act of the agent.

And this is true when any element of disaffirmance is lacking, as the failure to give notice or the failure to place the other party in *statu quo*. We submit that the eighth specification of error is well taken.

II.

The action of defendant's board on September 5,

1906, after fully discussing the subscription in suit, in authorizing a subscription to stock of plaintiff for defendant in the sum of \$125,000, was, in legal effect, a ratification of the subscription in suit.

(Ninth Specification of Error).

The minutes of defendant's board meeting on September 5, 1906, read as follows:

The question of Mr. Rosene's subscription to the stock of the Northwestern Development Company was fully discussed, and Mr. Thomson introduced the following resolution:

RESOLVED: That the president be authorized to subscribe to the stock of the Northwestern Development Company for this company in the sum of \$125,000.

Mr. Thomson moved the adoption of the above resolution and the same being seconded by Mr. A. J. Trimble, the same was put to a vote and unanimously carried.

The following resolution was introduced by Mr. Thomson and seconded by Mr. A. J. Trimble and was unanimously adopted, viz.:

WHEREAS, it was necessary to provide funds to build or purchase additional steamers for the company's use;

RESOLVED: That the president be instructed to sell or dispose of the stock held by this company in the Northwestern Development Company down to \$50,000. (Exhibit H, Record, pp. 59, 94).

There had been a credit of \$50,000 on the subscription in suit reported by Rosene at the April meeting of defendant's board (Record, p. 66) and a credit of \$25,000 on July 15th following (Exhibit 1, Record, pp. 66, 68).

Mr. Trenholme testifies, as to this latter credit that he might have known about it prior to September 5th but did not know it prior to Mr. Rosene's going to Nome (Record, pp. 106-107); that Mr. Rosene went to Nome either the first or second sailing of their steamer, the last of June or the first of July (Record, p. 105), (but Rosene was present at Seattle at the meeting of defendant's Board July 20, 1906—Record, p. 60); that he learned later in the year (than the April meeting), before the September meeting, that there had been an item of \$25,000 credited on open account for plaintiff on their books; *not on this subscription*; all he learned about it was just as you see on that memo. (defendant's exhibit 1, Record, p. 113), which read that it *was on the subscription*; it looked that the whole item as shown by the voucher was a credit on the subscription (Record, pp. 113-114); that there was an item similar to the \$50,000 already gone into the same channels as that \$25,000; there was nothing they could do until Mr. Rosene returned to Seattle (Record, p. 114); on July 15, 1906, plaintiff had a balance

of \$75,000 to its credit on defendant's books (Exhibit K1, Record, p. 114).

When asked: "Now, why didn't you charge back this item, if that had been wrongfully credited to them?" Trenholme answered: Why charge it back, that he would not have charged it back until Mr. Rosene came back. (Record, pp. 114-115). Still, he says, he had supervision of the general affairs of defendant, that in a general way he kept posted from time to time as to the state of the accounts between the company and other parties it was doing business with. (Record, p. 106).

With only \$75,000 credited on the subscription in suit on September 5, 1906, defendant, to account for its resolution authorizing a subscription in the sum of \$125,000, attempted to show:

First: By Hartman and Treat that plaintiff was indebted to defendant for freight and goods in the sum of the difference between the \$125,000 and \$75,000.

Hartman testifies:

That the \$50,000 that was paid in the first instance and which was to be returned by Mr. Rosene under the suggestions and talk in the April meeting, had not been, and more money had been paid to plaintiff; witness thought it was on account of

freight bills and goods sold plaintiff at Nome and things like that. (Record, p. 82).

That it was stated at the meeting of the directors who were there, including Mr. Trenholme, who had supervision of all of the accounts at all times, that in addition to \$50,000, \$75,000, or thereabouts, more as he recalled, had been added, had been taken out of the defendant's treasury and paid to plaintiff and that they did not see their way clear to get that money back and they had better settle it by taking shares of stock to the amount of \$125,000, as that would settle the whole thing and make everybody agreeable in both companies to settle it that way. That was the general plan on which they proceeded, and then a resolution was passed to take those shares and pay for them—the payment having already been made as stated. (Record, p. 82).

Did not know that he (Trenholme) reported at this meeting in witness' presence; it might have been the treasurer, Mr. Treat, as witness remembered—or they had something pending—witness knew there was a lot of freight at one time involved there—that he had the impression that they had a large freight item and stores sold at Nome, because the defendant ran a store at Nome—the defendant, as he recalled, sold merchandise to plaintiff that was operating up in Alaska and they were not paid for it over the counter and this became a matter of debit and credit and the plaintiff had obtained from the defendant a considerable amount of value in the way of freight and goods that was sent up by itself and merchandise they bought and other things, as he recalled the circumstances now; that he believed would put them in debt to the defendant, if they bought and did not pay cash over the counter. (Record, p. 85). His understanding, as he had told counsel, was that that was the amount of the incurred or the incurring liability—ob-

ligation—and he thought it was \$75,000. (Record, p. 87).

And Treat testifies:

That they had a general discussion and looked into the accounts of both companies and found the Northwestern Development Company owed the Northwestern Commercial Company such an amount for freight and supplies that if they were to settle upon a \$125,000 sum, it would merely square the account and make it satisfactory to both companies and start over again as it were; so the transfers were made; there had been some transfers made in the book without coming up before them—he did not think there was any cash paid for any of the stock; he thought it was merely a question of bookkeeper's transfer and journal entries; that he was the treasurer at that time; that there had not been any cash payments on this Rosene subscription that he knew of; he never knew how it was paid for. All of those things came up at that time. They found there had been entries and cross entries and credits and debits and that by making it \$125,000 they could nearly square the accounts and it would seem to be the proper thing to do—a compromise arrangement—and that resolution was passed. (Record, p. 95).

They talked over the amounts and called in the accountants and found that there had been credits for freight and for Nome stores, and so on, he did not think he examined the books personally. (Record, p. 97).

And when asked—"You don't know anything about the actual accounts, do you—one way or the other?" Treat answered: "That he knew there was, approximately, \$125,000; that was what was told them at that time; that his recollection was that that there was altogether about that lump sum, \$125,000, one

way and another, as he recalled it, so that in their making that \$125,000 subscription it would practically square the account. That he thought the debt was largely for freight. (Record, p. 97).

* * * so that, as he understood it, the two items then of \$50,000 which had been credited to them originally on the subscription and the \$75,000 which they owed for freight principally would make up the \$125,000; he thought that was wiping out the freight; he thought that was crediting them instead of charging them—crediting them with the stock and charging them with the freight; he did not know what entries were made; there were a great many entries and cross-entries, he was not a bookkeeper and could not tell; he was treasurer, but he had his man in there; witness never had anything to do actually with it; he did not do it personally; he hired a man to do the work in there as treasurer. (Record, p. 98).

* * * That he could not tell where the freight is charged; could not tell on that ledger account where the freight was charged against the \$125,000 that is credited to the company on their subscription; would not want to try, because he was not an experienced bookkeeper. * * * That his impression was that the larger portion of that \$75,000, or of the allowance they were making in September to foot up to \$125,000 as an offset to the subscription was freight. * * * He would say the most of it was freight. (Record, p. 100).

Second: By Trenholme, that plaintiff was indebted to defendant, not for freight and goods, but on open account on September 5th, in excess of \$50,000, which together with the \$75,000 previously paid

on the subscription would amount to \$125,000 authorized on a subscription.

Trenholme testifies:

That at a meeting of the Board of Trustees, September 5th the question came up as to this subscription to the stock of the plaintiff; at that time they agreed to authorize Mr. Rosene to subscribe for \$125,000; at that time the plaintiff owed the \$125,000, which included the \$75,000 which had been paid * * * Plaintiff had already been given credit for \$75,000 on this subscription—it was not on this subscription, the original seventy-five was not on the subscription—plaintiff owed that much money to defendant; up until that time defendant did not regard it as a subscription at all; in addition to that plaintiff owed them some \$50,000 odd dollars. (Record, p. 106).

* * * That on September 5th this plaintiff company owed them \$57,692, which, added to the \$75,000 which had been charged against their company and credited plaintiff, would make a little over \$125,000. (Record, p. 115).

Trenholme was then asked:

“And it was for the reason that these accounts about balanced in that way, that you said, ‘Well, we will take \$125,000 of this stock and call it square?’” and answered:

“That might have entered into it, but they decided to take the \$125,000 of *that subscription*; that was what they decided to do; their books showed that they had already been paid a certain amount on *the subscription*, so that they decided, after discussing it very, very thoroughly, that they would take \$125,000 because they took it up and discussed it and decided

to make it; this controversy was hanging all the summer." (Record, p. 115).

* * * The plaintiff had \$75,000 of their money already and perhaps \$100,000; plaintiff owed them \$57,000 more on open account; decided to dispose of it one way or the other, whether they were going to subscribe or not—they decided to subscribe and authorized him to subscribe. (Record, p. 115).

Witness was then asked:

"Now, why, having only \$75,000 invested in this subscription, why raise it \$50,000 more and then on the same day authorize a disposal down to fifty?"

And he answered:

"Why do it? It was their way of doing business and then they wanted to sell down to \$50,000."

Witness was then asked:

"Why not sell down from 75 to 50 and not put in 50 more?"

And answered:

"Plaintiff owed defendant fifty and defendant wanted to close that account."

Witness was then asked:

"Was that the only reason?"

And answered:

"Well, yes and no, they wanted to close it up and make,—if they were going to do anything, they wanted to make a subscription for the \$125,000." (Record, p. 116).

At that time this balance shows it was \$57,693; That the balance was struck August 31st and on the

5th of September there was a \$40,000 credit. * * * That the balance on August 31 was \$57,600; that on September 5th then they had a credit for \$40,000; that reduced the balance to the difference between the one item and the other which would be \$17,692, on the 5th day of September, 1906. (Record, pp. 118-119).

Thus we have Hartman, confessedly, without any real knowledge of the facts—only impressions (Record, p. 85), and Treat, who “was not a bookkeeper and could not tell; he was treasurer, but he had a ‘man’ in there and never had anything to do with it, he did not do it personally,” (Record, p. 98) who “never knew how it (Rosene’s subscription) was paid for,” (Record, p. 95), both attempting to show plaintiff indebted to defendant for freight in the sum of \$50,000, admitting the \$75,000 applied on the subscription, and “wiping out the slate” against plaintiff by a subscription for \$125,000.

If it were true that in addition to the \$75,000 credited on the subscription in suit, in April and July, plaintiff owed defendant on September 5, 1906, \$50,000 on account of freight, and defendant closed this account of an indebtedness of \$125,000 by authorizing a subscription for the latter amount, where are the entries in defendant’s books? (Exhibit K1). Where is plaintiff on or after September 5th charged with that \$50,000 freight item and where is the ac-

count closed by a credit of \$125,000 amount of subscription authorized by the resolution of September 5th? They nowhere appear on defendant's ledger account. (Exhibit K1) and no effort is made by defendant to show their ledger account erroneous in any particular—in fact, Rosene testifies that he had “yet the first time to find any incorrectness in them.” (Record, p. 168). But in lieu of such entries as we have suggested were necessary to close the matter on the theory of the testimony of Hartman and Treat, we find on Exhibit K1, defendant's ledger sheet, that plaintiff was credited on September 6, 1906, with \$25,000 “investment” and on September 25, 1906, with \$25,000 “capital stock purchased.” These entries and the absence of any entries supporting the statements of Hartman and Treat as to how the account was closed and how the “slate was wiped out” demonstrate to a certainty that the testimony of both Hartman and Treat is without any weight whatever in favor of defendant.

Then we have Trenholme, who understood book-keeping (Record, p. 120) first denying the item of \$25,000 on June 15th was a credit on the subscription, then admitting it, contradicting the statements of Hartman and Treat that defendant was indebted for freight; admitting plaintiff's freight was always prepaid

in cash; but claiming plaintiff indebted to defendant on open account on September 5, 1906, in the sum of \$57,693, which, together with the sum of \$75,000, former credits credited, totalled an indebtedness of ^{32,673} ~~\$127,693~~, and a closing of the account by authorized subscription for \$125,000; and finally being forced to admit that on September 5, 1906, plaintiff was only indebted to defendant on open account in the sum of \$17,692. (Record, p. 119); and admitting "that defendant decided to take the \$125,000 of *that subscription*; that was what they decided to do; their books showed that they had already been paid a certain amount on the subscription so that they decided after discussing it very, very thoroughly that they would take \$125,000 because they took it up and discussed it and decided to make it; this controversy had been hanging all summer." (Record, p. 115).

Finally, we have Rosene's testimony as follows:

"Well, I caused the Northwestern Commercial Company—money and property to be given to the Northwestern Development Company, but without the Commercial Company's knowledge, except my own personal knowledge in each instance, and afterwards of course the directors of the Northwestern Commercial Company decided to ratify my acts, which had been done unknown to them and unauthorized by them, by my making this subscription which was at my pleading and suggestion. (Record, p. 165).

* * * (And referring to the resolution of Sep-

tember 5, 1906, authorizing the subscription in the sum of \$125,000).

“In other words, the members of the Board of the Commercial Company acquiesced in what I had already done and expressed it in that form.” (Record, p. 169).

Nor can it be said that in picking out of a mass of testimony two statements, one by Trenholme admitting that defendant decided to take \$125,000 on that subscription in suit, and one by Rosene admitting that the defendant's Board ratified his acts by his making the subscription, acquiescing in what he had already done, nor can it be said, we repeat, that we are doing violence to the rest of the testimony of these two witnesses. The interest of these witnesses in attempting to screen the defendant from the subscription in suit sprang from self-interest in attempting to screen themselves, chief actors in their several official capacities in the original transactions; and while they did their best, yet in unguarded moments they inadvertently confessed and by that confession made plaintiff's case.

And further showing that the resolution of September 5, 1906, authorizing a subscription in the sum of \$125,000 was not authorizing a new and independent subscription, as defendant's minutes (Ex. H)

and the allegations of defendant's first affirmative defense would have it appear, but was an attempted ratification of the subscription in suit to the extent of \$125,000, an attempted compromise of the liability of defendant on that subscription in suit:

Hartman testifies:

That they did not see their way clear to get that money back and they had better settle it by taking shares of stock to the amount of \$125,000 as that would be a plan to settle the whole thing and make everybody agreeable in both companies, to settle it that way (Record, p. 82);

That he drew the resolution which authorized the subscription for \$125,000 (Record, pp. 86, 87);

It was a disagreeable matter for them, that was the way they talked about it and they wanted to get out and be relieved of the situation and the discussion and the embarrassment and the entanglement and with as little loss as possible. (Record, p. 88).

That he presumed that resolution expressed in toto the desire of the board with respect to that subscription of defendant to plaintiff's stock, he couldn't say—that he embodied what as a lawyer he thought carried out the transactions as it was transacted that day before the board as he understood the action; that he put in every element that had any bearing in the question so far as he had remembered. (Record, p. 88).

That resolution was adopted to settle that tangle that they got into, understanding that they wiped the slate as between the companies. (Record, p. 89).

That in that way, the matter could be ended which was then disturbing the officers of the two companies and the two companies and it was sort of a compromise settlement or arrangement finally in the interest of peace and harmony. (Record, p. 89).

That he thought the word "compromise" ought to have been in there; it would have been better, but it was not, it was a compromise arrangement believed for the interest of all the parties and was so stated and recorded and acted upon in that way when they voted on this resolution. (Record, p. 90).

Treat in his testimony characterizes the subscription authorized by the resolution as a "compromise arrangement." (Record, p. 95).

A compromise of any difference or dispute between two corporations on that subscription in suit as a valid subsisting contract would certainly have been in order and, if authorized by the proper authorities of each company, would have been binding upon both.

But what was there to compromise? Rosene had subscribed on behalf of defendant to \$250,000 of plaintiff's preferred stock; the defendant had been advised of that subscription at the April meeting of its board and that board had at that time either disaffirmed the subscription and repudiated or by failing to disaffirm and repudiate, had acquiesced and it had become binding upon defendant in the full amount.

And in September, the status was the same—the

subscription was either a valid subsisting contract binding upon the defendant or it was not.

There is no evidence of any condition placed on the subscription, authorized by the resolution, for the sum of \$125,000, that defendant should be relieved of liability of all or any part of the subscription in suit; in fact defendant in its pleadings ignores the subscription in suit and contends that it was a new subscription; and there is no evidence that the plaintiff authorized or consented to or ratified any compromise, as such, or that it released defendant from its full liability on the subscription in suit.

A corporation cannot release an original subscriber to its capital stock.

Morgan v. Struthers, 131 U. S. 246.

Upton v. Tribilcock, 91 U. S. 45.

The directors of a corporation have no power to release a subscriber unless expressly granted.

“Every such arrangement is regarded in equity not merely as *ultra vires* but as a fraud upon the stockholders, upon the public and upon the creditors of the company.”

Putnam v. R. R. Co., 16 Wall. 390.

And what the directors as a board cannot do, can-

not be done by a part of the directors acting individually.

The evidence shows that Rosene reported the action of defendant's board meeting of September 5, 1906, to Davis, Housman and Henderson, directors of plaintiff, in New York in September, 1906, and it also shows that there was no board meeting called or held at that or any other time to consider the matter. (Test. Rosene, Record. pp. 165, 134, 167, 176).

It was incumbent upon defendant, upon the subscription in suit being reported to it at its April, 1906 meeting, if it desired to disaffirm it, to announce that purpose and *adhere* to it. Its action at its September, 1906 meeting evidenced a playing fast and loose, a vacillation which was fatal to the right of disaffirmance which had before subsisted, whether previously exercised or not.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of facts, at once announce his purpose and adhere to it. If he is silent and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract as if mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative prop-

erty like that here in question which is liable to large and constant fluctuations in value. (cases cited).

Grymes v. Sanders, 93 U. S. 55.

Ratification or disaffirmance in toto: A leading principle in law relating to this subject is that where a contract is made by one assuming to act on behalf of the corporation and for a purpose authorized by its charter and the corporation, after knowledge of the facts attending the transaction, is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies unauthorized acts and estops itself from repudiating it. The reason is that it must exercise its option of affirming or disaffirming in whole and not in part; that it cannot disaffirm so much of the unauthorized act as is onerous while retaining so much as is beneficial; that it cannot keep the advantage while repudiating the burden; that it cannot disapprove the contract while keeping the consideration.

10 Cyc. 1078.

We submit that the ninth specification of error is well taken.

III.

Evidence showing Rosene's continuing relation with defendant as its president was admissible as bearing on the question as to whether the subscription was repudiated or not; and its rejection by the court was error.

(Second Specification of Error)

It was the contention of defendant in its plead-

ings: That its president Rosene was not authorized to make the subscription in suit and that he had wrongfully and without its knowledge applied \$50,000 of its funds on the subscription in April, 1906, and that notwithstanding that the subscription was repudiated by defendant in April, he had wrongfully without its knowledge applied a further sum of \$25,000 on the subscription in July, 1906, and that on September 5, 1906 such misappropriation by Rosene amounted to the sum of \$125,000.

The plaintiff was entitled to have the jury and trial court, in weighing the evidence of defendant in support of these contentions, consider the relations existing between defendant and its president Rosene following their learning of these several misappropriations of its funds; for any continued faith and confidence in him as their chief executive officer, after knowledge of such alleged wrongful acts, would have some bearing as to whether its funds had been so misappropriated and without its knowledge or consent and that would affect the question as to whether or not there had been a repudiation or a new subscription.

The evidence of plaintiff shows that its board on April 12, 1907, by resolution designated an Executive Committee, for the first time, consisting of H.

C. Davis, A. A. Housman and Caleb Whitehead; and at the same meeting by resolution abolished the office of managing director to take effect May 1, 1907, relieved Rosene of his duties as such and directed that he be notified to that effect and be requested to make a full and complete report of all matters and things done and performed by him up to the date of the termination of his office. (Record, p. 78).

The plaintiff desired to show that Rosene was continued as president of defendant until subsequent to October 23, 1907 and for that purpose offered in evidence the minutes of defendant's executive committee of October 23, 1907, as follows:

"Be it resolved that Mr. Eccles be requested to call a meeting of the trustees at a very early date for the purpose of asking for the resignation of president Rosene or accepting the resignation of the balance of the committee."

These minutes upon being read in evidence were objected to by defendant, the objection sustained by the court and the evidence stricken, to which ruling of the court plaintiff excepted and its exception was allowed. (Record, p. 63).

We submit that the evidence was admissible as proper to be considered on the trial of the cause for the purpose of showing the continuance of Rosene as

defendant's president until subsequent to October 23, 1907, more than a year after September 5, 1906 at which time defendant alleged Rosene had wrongfully and without its knowledge misappropriated \$125,000 of its funds.

We submit that the court erred in its ruling and that the second specification of error is well taken and the evidence thus excluded should be considered by this court.

IV.

The conclusion of defendant's witness as to defendant's action with respect to ratifying the subscription in suit, was inadmissible in evidence and the court erred in admitting such conclusion.

(Third Specification of Error)

The defendant asked its witness Trenholme on direct examination the following question:

"Did the board of trustees of defendant, Commercial Company, at any time ratify any subscription made by Mr. Rosene to the capital stock of the Development Company outside of the subscription authorized at that meeting of September 5, 1906?"

To which question plaintiff objected as incompetent and not the best evidence and calling for the conclusion of the witness; which objection was overruled by the court, to which ruling the plaintiff ex-

cepted and its exception was allowed, whereupon the witness answered: "They did not."

We submit that the trial court erred in this ruling.

What the board did, whether of record or not, was a pertinent inquiry; but the question as framed called for the conclusion of the witness and was objectionable on that ground alone; further it was objectionable on the ground of not being the best evidence; for the minutes are the record of the transactions of the board and the best evidence of those transactions.

We submit the court erred in its ruling and that the third specification of error is well taken and that the answer of the witness should be excluded in the consideration of the case by this court.

V.

Delivery of stock to defendant.

(First specification of error).

It is alleged in the amended complaint: That 25,000 shares of plaintiff's preferred stock were delivered to and accepted by defendant between April 4th and November 9th, 1906, upon payment by defendant of \$125,000 on account of the subscription in suit (paragraph XII); and that between the same dates common shares deposited by A. A. Housman & Co. were delivered to the order of defendant under

the terms of the subscription in suit; (paragraph XIII) and that such delivery and acceptance were, from time to time, for payments as they were made by defendant on the subscription in suit (paragraph XIII).

These allegations are denied by defendant's amended answer to the amended complaint.

The approximate date of the delivery of these certificates of the capital stock of plaintiff is material to the issue of the case:

(1st) Because the date of the delivery is a circumstance having a bearing on the question whether or not there was a repudiation of the subscription in suit;

(2nd) Because of the expressed reference to the charter and by-laws in the form of plaintiff's stock certificate (Exhibit C and C1) and notice thereof to the holder;

(3rd) Because the shares of stock delivered to defendant were represented at a meeting of the plaintiff's stockholders at Portland, Maine, on January 23, 1907, at which meeting the purchase from Rosene of the mining property and the issuance of common stock full paid and the payment of \$245,000 to Rosene in payment thereof, were ratified and adopted.

The certificates themselves which were delivered to defendant, all issued in the name of A. A. Housman & Co. produced at the trial by defendant at plaintiff's request, are dated and numbered in the order of their issue, as follows:

1906		Shares			Shares
Apr. 2	Pref., Cert. G 37....	10,000	Common, Cert. G 52.....	2,000	
	" " G 38....	2,000	" " G 53.....	10,000	
	" " G 41....	3,000	" " G 55.....	3,000	
June 9	" " F 6....	1,000	" " F 15.....	1,000	
July 24	" " F 7....	1,000	" " F 24.....	1,000	
	" " F 8....	1,000	" " F 25.....	1,000	
	" " F 9....	1,000	" " F 26.....	1,000	
	" " F 10....	1,000	" " F 27.....	1,000	
Nov. 7	" " F 11....	1,000	" " F 43.....	1,000	
	" " F 12....	1,000	" " F 44.....	1,000	
	" " F 13....	1,000	" " F 45.....	1,000	
	" " F 14....	1,000	" " F 46.....	1,000	
	" " F 15....	1,000	" " F 47.....	1,000	
		<hr/> 25,000		<hr/> 25,000	

and all bear an assignment on the back thereof by A. A. Housman & Co. under date September 24, 1907.

These certificates were produced by McMasters, as treasurer of defendant, who testified that when he assumed the office of treasurer the certificates were in New York (Record, p. 63); plaintiff had served notice to produce upon defendant and they had come into his manual possession in July, 1916.

There was no evidence offered by the defendant as to when or where defendant first received them, but the presumption is that they were received on the date of the assignment, to-wit: September 24, 1907. This pre-

sumption, however, is subject to rebuttal, which was offered as follows:

(a) Ex. N, letter on letterhead of defendant, dated Seattle, Wash., April 18, 1906, addressed to Mr. George Henderson (plaintiff's secretary at New York) and signed John Rosene, as follows:

Dear Mr. Henderson:

Will you obtain from the treasurer of the Development Company 12,000 shares of preferred stock, par value \$60,000, with an equal amount of common stock, and send same to me by registered mail or express. The interest for this should be made: 50,000 being 20% of Northwestern Commercial Co.'s subscription and 10,000 being 20% of my individual subscription. This to be charged against the money due me from the company on account of the mining property purchased. As you know, there was \$245,000 due me from the company on this account, \$50,000 of this has already been paid by issue to Mr. Housman of 10,000 shares of preferred stock and an equal amount of common, and after this \$60,000 has thus been credited against this account there would still remain due me \$135,000 from the Development Co. I simply make this detail explanation so that there shall be no confusion in the interest.

JOHN ROSENE.

Marginal notes on this letter as follows:

G37—10,000 pfd.

G52— 2,000 C

G53—10,000 C

G38— 2,000 pfd. (Record, p. 69)

This letter is suggestive when read in connection with the stipulation of May 11, 1914 (f) below.

(b) Defendant's Exhibit No. 3, offered by plaintiff (Record, p. 181), was a letter from Hartman, attorney for the defendant, to its president, written pursuant to the request of its Board of Trustees of date April 19, 1907, and contains a form of notice to be given its secretary, all as follows:

"Dear Sir:

"I have yours of the 18th in re notice of the Northwestern Development Co. under date April 10th asking for payment of subscription of stock on behalf of the Northwestern Commercial Co. and return herewith the letter. Please have Mr. Trenholme, as secretary, write a letter in form substantially as I will give below and at the same time it will be in order for you to write Mr. Henderson, not as president or (of) our company, but as chairman of the Board of the Development Company to the effect that the Commercial Company is in no way liable for any call upon capital stock, having paid its full subscription.

"As a letter for Mr. Trenholme to write, permit me to suggest the following:

'Mr. Geo. Henderson, Sec'y,
Northwestern Development Co.,
New York City.

"Dear Sir: Your favor of April 10th addressed to the Northwestern Commercial Co., which asks for a payment of 10—10% of the amount of this company's subscription to the capital stock of your company is received. You are aware that this company never authorized any subscription whatsoever, except for twelve hundred and fifty (1250) shares, which has

been fully paid, as evidenced by the certificate of capital stock now held by the Northwestern Commercial Company. The question of the full subscription was discussed at the adjourned annual meeting of the Northwestern Commercial Company on the 10th inst., at that time Mr. John Rosene, chairman of the Board of Directors of your corporation, announced that this company's subscription to the capital stock had been fully satisfied and paid and that there was no further liability, but in order that the matter might be perfectly clear, a resolution was adopted which has been approved by the stockholders, which is as follows:

“‘RESOLVED: That this corporation does hereby confirm its subscription to the capital stock of the Northwestern Development Company in the sum of \$125,000, par value, and no more, and that the attorney of the company be and is hereby authorized and directed and required to prepare the necessary notice to be sent to the secretary of the Northwestern Development Company, notifying the said Northwestern Development Company that no subscription to the capital stock of that company was ever authorized in any sum or sums whatsoever except the \$125,000.’

“This, therefore, is to notify you of the situation and to apprise you of the fact that this company is in no way liable for any subscription called, none having ever been authorized by the trustees or stockholders, other than that which has been fully paid and satisfied.

“A letter on about these lines will fulfill our requirements. Yours truly,” (Record, p. 107).

Trenholme testified that that form of notice he gave plaintiff by mail. (Record, p. 107).

Here is an admission by defendant that on April 19, 1907, it had certificates of shares of plaintiff's capital stock; 1250 is the number of shares named in that letter—this was evidently a mistake, the writer of the letter evidently believing the shares were \$100 par value (1250 shares, \$100 par value=\$125,000); whereas, they were \$5.00 par value (25,000 shares at \$5.00=\$125,000).

(c) On September 18, 1907, the Executive Committee of defendant adopted the following resolutions:

“Upon motion, resolved that this Company's proxy be forwarded to Mr. S. W. Eccles to represent this company at a special stockholders' meeting of the Northwestern Development Company to be held at the office of said corporation at 281 St. John St., Portland, Maine, October 3, 1907, at 10 o'clock A. M., said proxy to be given with power of substitution.”

“Upon motion, resolved that the Treasurer of this Company be instructed to have this Company's stock in plaintiff Company reissued in name of Northwestern Commercial Company.” (Record, pp. 60-61).

Here is an admission that defendant had certificates of shares of plaintiff's capital stock on September 18, 1907, on which it desired to be represented at a stockholders' meeting of plaintiff at Portland, Maine, to be holden October 3, 1907, and its resolution that its treasurer be instructed to have its stock in plaintiff *reissued* in the name of defendant is evi-

dence, not only that it held these certificates of capital stock in plaintiff, but that those certificates were issued in a name other than that of defendant.

(d) One of the resolutions of defendant's Board of September 5, 1906, reads:

"Resolved, that the president be instructed to sell or dispose of the stock held by this company in the Northwestern Development Company down to 50,000." (Record, p. 94).

It will be observed that the thing to be sold or disposed of by this resolution is not an "investment" or an "interest" in the plaintiff corporation, but "stock held" by defendant in the plaintiff.

(e) The payment of \$25,000 by defendant to plaintiff on September 15, 1906, is entered on defendant's journal "capital stock purchased September 15, 1906," \$25,000.

(f) In its case in chief plaintiff offered in evidence a stipulation between the parties in this cause dated May 11, 1914, filed in this cause May 12, 1914, which, omitting the title of the court and cause, is as follows:

It is hereby stipulated by and between the parties hereto:

1. That the plaintiff's complaint in the above entitled cause may be amended by adding to para-

graph X of the original thereof in file in the above entitled cause, as follows:

"That between the 4th day of April, 1906, and the 9th day of November, 1906, upon payment by defendant to plaintiff of said \$125,000, as aforesaid, plaintiff issued to defendant and defendant accepted therefor, 25,000 shares of said preferred stock."

2. That defendant's second amended answer heretofore served and filed in said cause, may be amended by adding to paragraph numbered I of the said second amended answer the following:

"except that defendant admits that between April 4, 1906 and November 9, 1906, plaintiff issued to and defendant accepted, 25,000 shares of the preferred capital stock of plaintiff for the \$125,000 which said John Rosene had paid out of the funds of this defendant; and defendant denies that any of said preferred stock was issued to or accepted by defendant otherwise than as hereinabove expressly admitted."

3. That in paragraph numbered I of the second affirmative defense in said second amended answer, the date, "1907" in the first line thereof, be changed to read "1906."

4. That said second amended answer as thus amended, shall be considered and stand as defendant's answer to said complaint as so amended.

Dated Seattle, Washington, May 11, 1914.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant.

To the admission of which defendant objected and which objection was sustained by the court below, to which ruling of the court plaintiff excepted and its exception was allowed.

The stipulation speaks for itself; only so much of it as is contained in paragraphs 1 and 2 ^{and 2} ₁ is pertinent to this argument.

This stipulation was in the nature of an extra-judicial admission, a voluntary and certain written statement of the existence of a relevant matter of fact and as such was competent evidence against defendant by whom it was made, as a fact tending to show the truth of the statement. 16 Cyc. 939.

Although a pleading which has been withdrawn or superseded by amendment is out of the case in its capacity as a pleading and the pleader is no longer concluded by it, relevant statements therein may still be competent as extra-judicial admission; to be so used the superseded pleading must be introduced in evidence; must be shown to have been originally made as a statement of fact and connected with the party himself. 16 Cyc. 971.

A stipulation of counsel as to matters of fact within the scope of their professional function binds the party as a judicial admission, although made before issue joined, and is competent evidence against him, even on a second trial. 16 Cyc. 973.

Exception was urged to the admission in evidence of defendant's original answer in the case, in

which it was in effect, admitted that defendant owned and operated the train which killed the bull in question. But we have no doubt of its admissibility and the admission therein is so far binding upon the defendant as to be conclusive of the fact admitted, unless shown to have been made under a mistake; and no such showing was admitted by the defendant.

O. R. & N. Co. v. Dacres, 1 Wash. 195.

We submit that not only is the presumption that the assignments of these certificates of stock were on the day and date thereof endorsed thereon, overcome by the rebuttal evidence, but that the delivery of the 25,000 shares of preferred stock in plaintiff to defendant between April 4, 1906, and November 9, 1906, was admitted by the stipulation above referred to and that admission is binding on defendant as a fact.

We submit that the ruling of the court was erroneous and that the first specification of error is well taken and that the admission of the defendant, in the stipulation above referred to, should now be considered by this court.

VI.

The allegations of the first affirmative defense in defendant's amended answer to amended complaint.

That the amount of \$125,000 of its funds which

had without its authority been applied by Rosene or under his direction as payment on the subscription in suit, were to be applied in payment of the subscription authorized by defendant's resolution of September 5, 1906, of which oral notice was given plaintiff and the moneys were so applied,

are not sustained by the proofs.

The defendant in its pleading is attempting to justify the subscription authorized by its resolution of September 5, 1906, on the theory that that amount of defendant's money, \$125,000, had been, without its knowledge or consent, wrongfully applied by Rosene on the subscription in suit (which it is alleged in this first defense was repudiated in April, 1906 by defendant); and in order to recoup itself, subscribed for \$125,000 of plaintiff's preferred stock and applied on the latter subscription that equal amount which had theretofore been wrongfully credited to plaintiff on the subscription in suit.

With less than \$125,000 alleged to have been wrongfully applied on the subscription in suit, a resolution authorizing a subscription in the full sum of \$125,000 would have left defendant voluntarily making a payment in excess of the amount that had been so wrongfully applied, and this would have had the effect of a ratification of the subscription, in suit.

But when it came to proof, defendant was only able to show \$75,000 wrongfully applied on the subscription in suit, according to the defense, and attempted to account for the difference between the \$125,000 alleged as wrongfully applied and the \$75,000 wrongfully applied according to their testimony, as follows:

First: by the testimony of Hartman and Treat that the \$50,000 (difference between \$125,000 and \$75,000) was for freight and goods for which plaintiff owed defendant on Sept. 5, 1906.

Second: By the testimony of Trenholme that plaintiff was indebted to defendant on open account on September 5, 1906, in the sum of \$57,693.

The testimony of Hartman and Treat was nullified by the testimony of Trenholme that plaintiff always prepaid in cash its freight and their company always did its business on a simple cash basis; and was further nullified by the absence of the necessary entries on defendant's books to support their statement that plaintiff's account was closed, the "slate wiped out" by charging plaintiff with the \$50,000 freight and goods, and crediting plaintiff with \$125,000 on account of the subscription authorized by the resolution of September 5, 1906.

Even assuming for the sake of the argument, the \$75,000 wrongfully credited on the subscription in suit prior to September 5, 1906, and a further indebtedness of plaintiff to defendant in the sum of \$50,000 for freight and goods on September 5, 1906, a total indebtedness on the latter date by plaintiff to defendant of \$125,000, the credit extended plaintiff for freight and goods, whether entered on defendant's books or not, was voluntarily given else there would have been no such item (for it is not claimed by defendant that plaintiff defaulted by misrepresentation or otherwise in the amount alleged to be due to defendant for freight and goods); and defendant, by its own testimony, was voluntarily applying this item of \$50,000 for freight and goods on the subscription under the resolution of September 5, 1906 and not because that item had previously been wrongfully applied out of defendant's funds to the subscription in suit.

The testimony of Trenholme on this point was nullified by his own admission finally drawn from him that the balance due the defendant by plaintiff on September 5, 1906, was \$17,693.

So in no event, by any of the defendant's proof, is it made to appear that more than \$75,000 of defendant's funds were wrongfully applied on the sub-

scription in suit; and on the other hand taking either the testimony of Hartman and Treat or of Trenholme, it affirmatively appears that defendant was voluntarily applying \$50,000 on the subscription to plaintiff's stock in the sum of \$125,000.

So much therefore of this first affirmative defense as alleges misappropriation or wrongful application without the knowledge or consent of defendant, to the extent of \$125,000 prior to September 5, 1906 or at all, as a credit on the subscription in suit and the application of that amount so wrongfully applied on the subscription under the resolution must fall, for want of evidence to support it.

VII.

The allegations of the second affirmative defense in defendant's amended answer to the amended complaint:

That on September 5, 1906, defendant learned that Rosene without its knowledge or consent, had applied \$125,000 of defendant's funds on the subscription in suit, and that defendant having claim against or right to recover from, plaintiff in that sum, the plaintiff agreed orally to waive and release and did waive and release and discharge defendant from liability to plaintiff and from any further claim by plaintiff against defendant on the subscription in suit,

in consideration of the oral waiver and release by defendant of its right and claim to recover the sum of \$125,000 so turned over to plaintiff out of defendant's assets are not sustained by the proofs.

(Tenth Specification of Error)

In the first place such a defense is inconsistent with the first affirmative defense that said sum of \$125,000, so wrongfully applied out of defendant's assets to plaintiff, was applied by defendant on a subscription, in like amount, authorized by defendant's resolution of September 5, 1906.

Certainly defendant could not use the same \$125,000 which it claimed plaintiff owed it, first, as consideration for the subscription and purchase of an equal amount of plaintiff's preferred stock, and second, as a consideration for mutual release and discharge between these two corporations, defendant releasing plaintiff of defendant's claim and right to recover that amount wrongfully applied as aforesaid, and plaintiff waiving and releasing defendant of any liability of defendant to plaintiff or further claim on the subscription in suit.

In the second place, for reasons given in the Point VI of this brief, immediately preceding, not more than \$75,000 of defendant's funds were ever

wrongfully applied, without knowledge or consent of defendant, to the subscription in suit; any amount in excess of that \$75,000, applied on the subscription under the resolution of September 5, 1906, would be a voluntary application by defendant of its own funds or credits, according to defendant's proofs.

The second affirmative defense must for these reasons fall, for want of evidence to support it.

We submit that the tenth specification of error is well taken.

VIII.

Fraud—Breach of Fiduciary Relation.

(Seventh Specification of Error).

It is alleged in defendant's first affirmative defense to its amended answer in substance: That Rosene, with others as promoters of plaintiff, and as owners of certain mining properties in Alaska, of little value, agreed that title to said properties should be conveyed to Rosene and by Rosene to plaintiff and that Rosene receive therefor from plaintiff \$245,000 cash in full payment for said properties; and that \$1,250,000 of plaintiff's common stock should be issued, ostensibly as part payment for the properties, but in reality as a bonus to Rosene and other promoters of plaintiff, and it was further urged as part

of the arrangement that Rosene should provide money to be paid for the property by subscribing to defendant's preferred stock in the amount of \$250,000 on behalf of defendant and that the money realized on said subscription should and would be appropriated to the payment to Rosene of said \$245,000 under said agreement; that the subscription in suit was made and accepted by plaintiff pursuant to said agreement of Rosene with plaintiff and said promoters and in furtherance of his personal interest and the interest of said promoters and not otherwise; that plaintiff, after its organization, and its officers and directors, had full knowledge of the facts, understandings and agreement above set out and became a party thereto and the subscription in suit was accepted by plaintiff with knowledge of all the facts above set out; and pursuant to said agreement common stock was issued by plaintiff to the promoters, and the defendant did not authorize the subscription in suit, and was ignorant of the secret understandings above set out until 1910 or 1911. (Record, pp. 24-25).

The evidence shows that the original owners of the mining properties were paid \$245,000 for its conveyance to Rosene by Rosene and his associates and that Rosene in turn conveyed to plaintiff for \$245,000 cash and \$3,750,000 in common stock, full paid, of

plaintiff, of which \$1,250,000 of common stock was issued to Rosene and retained by him and split up between himself, French and Housman, promoters of plaintiff, as a bonus.

The validity of the issuance of \$3,750,000 common stock including the \$1,250,000 thereof bonus to Rosene, we have discussed under another point in this brief, under the heading "Bonus Stock."

We are now only concerned with the allegations of the first affirmative defense constituting a breach on Rosene's part of the fiduciary relation existing between him and defendant.

At the time the subscriptions to plaintiff's preferred stock were informally allotted, a Mr. Myers of London, was to pay \$25,000 flat for an option on half of the stock, that is, on \$2,500,000 stock; and Mr. Farquhar was to take \$250,000. Rosene for defendant \$250,000, A. A. Housman for himself \$50,000 and Rosene for himself \$50,000. (Test. Rosene, Record, p. 129).

Housman, Myers and Rosene, by the use of \$50,000 from Housman, \$50,000 from Rosene and \$25,000 from Myers, made up a pool—and Rosene on March 15, 1906 paid McConnell, holding title to the mining properties, for the conveyance from McConnell, \$93,-

000 cash and gave him his (Rosene's) personal note for \$100,000. (Record, pp. 130, 163).

Defendant did not offer any evidence supporting the allegations of its first affirmative defense that the money to pay the original owners for the mining properties purchased by the plaintiff, was to be provided by defendant or that any of the money realized on the subscription in suit was applied in payment to Rosene of \$245,000 cash paid on plaintiff's purchase price, or that the subscription in suit was ever made by Rosene or accepted by plaintiff pursuant to any agreement or secret understanding between Rosene and the other promoters and the plaintiff, its officers and directors.

The money realized on the subscription in suit was as follows:

1906	
April	\$50,000
July 15th	25,000
Sept. 6th.....	25,000
Sept. 15th	25,000
	<hr/> \$125,000

Of plaintiff's preferred stock subscribed, there was paid for and issued, \$1,699,450 par value. (Exhibit N2, Record, p. 72).

Between April 18th and August 31st, 1906, defendant had handled account of disbursements for and

on behalf of plaintiff through its accounts, at least \$400,000 (Test. Trenholme, Record, p. 108).

The payments to McConnell and others as original owners of the mining properties were all in 1906 as follows:

February 7th to French.....	\$20,000	
March 15th to McConnell.....	93,000	
April 2nd to McConnell.....	20,000	
May 31st to McConnell.....	20,000	
June 1st to McConnell.....	24,000	
June 22nd to French.....	6,000	
June 1st to French	20,000	
June 1st to French.....	10,000	
May 29th to French.....	1,700	
May 14th to French.....	20,000	
August 15th to French.....	10,000	
		<hr/>
		\$244,700

(Test. Rosene, Record, pp. 163, 164).

Whatever breach of fiduciary relation on Rosene's part there was arose solely from the fact that Rosene received a bonus of \$1,250,000 common stock to be split up between himself, Housman and French, as promoters of plaintiff, for whose preferred stock he subscribed on behalf of defendant the sum of \$250,000, defendant alleging ignorance of the bonus to the promoters.

The charter and by-laws of plaintiff both ex-

pressly contemplated the purchase of the mining properties for \$245,000 cash and issue of \$3,750,000 common stock to Rosene.

The defendant as a stockholder is charged with knowledge of plaintiff's charter and by-laws.

A stockholder is chargeable with notice of its by-law.

1 Cook, Corp. 6th ed., Sec. 4a, p. 27.

citing

Richardson v. Devine, 193 Mass. 336;

Cummins v. Webster, 43 Me. 192, 197.

The by-laws of a corporation may operate as a contract among its members, and they are generally presumed to have notice of them.

5 Thomp., Corp., Sec. 5987.

This is a legal presumption, conclusive in its nature.

I Thomp., Corp., Sec. 941.

Direct proof of notice of its by-laws is not required.

Id.

That this breach of fiduciary relation, if there were such a breach, was first known, not as the defendant alleges in its first affirmative defense, in the

year 1910 or 1911, but in October, 1908, more than three years before the commencement of this action on March 29, 1912, is shown by statements of the presidents of plaintiff and defendant at that time.

Mr. W. R. Rust, in his deposition, states: That about October 6, 1908, at Seattle, as defendant's president, he received, by mail or private delivery, a letter, dated October 5, 1908, addressed to defendant, signed by Mr. E. J. Mathews, as plaintiff's president, with two printed enclosures (copies of letter and enclosures attached to his deposition); that thereafter and during the month of October, 1908, at Seattle, as defendant's president, he personally acknowledged receipt of that letter and enclosures to Mr. Mathews as plaintiff's president, at which time the original capitalization of plaintiff, including the purchase by it from Rosene of the mining properties for \$245,000 cash and \$3,750,000 common stock, paid up, as set out in the enclosures to the letter above referred to was called to his attention and discussed between them. (Record, pp. 178-179).

Mr. E. J. Mathews, for plaintiff, testifies that he was president of plaintiff from July, 1908, to January, 1910 (Record, p. 179); in October, 1908, possibly in September also, he discussed with Mr. Rust, president of defendant, the matter of the com-

mission or profits to the promoters of plaintiff and the question of the issuance of \$3,750,000, par value, common stock of plaintiff to Rosene; and Mr. Rust stated that of that amount \$2,500,000 was set aside as a bonus to subscribers to plaintiff's preferred shares and the other \$1,250,000 was a personal profit to Mr. Rosene and his associates. (Record, p. 181).

Knowledge of these facts by defendant is specially pleaded in plaintiff's reply to defendant's amended answer.

We submit that the 7th specification of error is well taken.

IX.

BONUS STOCK.

(Fifth, Sixth and Eleventh Specification of Error).

The fifth affirmative defense in effect alleges:

That plaintiff was organized by Rosene et al, as promoters who, in order to secure the common stock as a bonus or gift and without payment of any money and receipt by the corporation of any property, services or other thing of value as a consideration for the issuance of the common stock and contrary to law and public policy of the State of Maine, the domicile of plaintiff, entered into a scheme or device whereby Rosene et al, owning mining property which they agreed to sell to plaintiff when organized, for \$245,000, arranged and agreed between said promoters and officers and directors of plaintiff that said property

was to be conveyed to plaintiff for the ostensible consideration of \$245,000 cash and \$3,750,000 common stock full paid, although the real consideration was \$245,000 cash; this cash consideration to be paid by plaintiff to Rosene for the owners of the property and \$3,750,000 common stock to be issued to A. A. Housman & Company, \$1,250,000 of which to be delivered to Rosene et al, as a bonus and the remainder of \$2,500,000 to be delivered by A. A. Housman & Company to subscribers to preferred stock of plaintiff as they paid their subscriptions (Par. II.)

That the common stock was issued by plaintiff to A. A. Housman & Company and never issued to the vendors of said property. (Par. III.)

That the property was of little if any value and not considered by vendors nor by plaintiff nor its officers or directors as having actual or speculative value in excess of \$245,000 and was not at any time valued by plaintiff or its directors in good faith in the exercise of their honest judgment in any case in excess of \$245,000 (Par. IV.)

That the directors at the time of issuance or authorizing the issuance of said stock and purchase of said property had been selected and controlled by Rosene et al., acted in their interest and under their control and had no personal knowledge of said property or its value and if they pretended to make any valuation of the same they acted wholly under the direction and control and in the interest of said promoters and exercised no independent judgment and did not in fact make any bona fide valuation of said property. (Par. V.)

That plaintiff has never had under its ownership or control so as to be able to issue or cause to be issued to defendant in performance of the subscription

contract, any shares of common stock for which par value has been paid in money or labor or property, either of an actual value equal to not less than par or at a valuation not less than par made in good faith by the directors of plaintiff; but that the common stock proposed and offered in the amended complaint has been or will be illegally issued under and pursuant to said fraudulent scheme and device and for no consideration to plaintiff or else for alleged labor or property at a valuation by plaintiff's directors not fixed in good faith and known by plaintiff and its directors to be excessive and beyond any fair valuation of such labor or property. (Par. VI.)

A detailed statement of the facts, with reference to pages of the Record, is contained in Statement of the Case in this brief at pages 1 to 29 and reference is here made thereto instead of repeating the same here.

The facts are substantially as follows:

The plaintiff was on March 17, 1906 incorporated under the Corporation Laws of Maine, R. S. 1904, Sec. 50 of Chapter 47 of which provides as follows:

Any corporation may purchase mines, manufactories, and other property necessary for its business, and the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for the business, and issue stock to the amount of the value thereof in payment therefor, and may likewise issue stock for services rendered to such corporation and the stock so issued shall be full paid stock and not liable to any further

call or payment thereon, and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased or services rendered, shall be conclusive.

In February, 1906, Rosene secured an option on mining properties, purchase price \$245,000, and resold the properties to the plaintiff corporation, of which he was one of the promoters, for the consideration of \$3,995,000, as follows: \$245,000 cash and \$3,750,000 in 750,000 shares of common stock, par value \$5.00 each, issued full paid and non-assessable to Rosene; Rosene transferred 500,000 shares of that common stock to a trustee for the benefit of the subscribers to plaintiff's preferred stock and absorbed the balance, to-wit: 250,000 shares as a bonus to him and his associates as promoters; a remnant of the 500,000 shares of the common stock, deposited with the trustee, at the commencement of this action remained on hand, to-wit: 160,099 shares of common stock for the benefit of subscribers to preferred stock, and out of this remnant plaintiff tendered to defendant in court, during the trial of this action, 25,000 shares common stock (together with 25,000 shares of preferred stock) to comply with the subscription in suit.

On March 20, 1906, the time plaintiff authorized the payment of \$245,000 and the issuance of 750,000 shares of common stock, full paid, the directors act-

ing unanimously and so authorizing the transaction, were, together with Rosene, owners and holders of all of the stock subscribed or issued, and on March 29, 1906, at a stockholders' meeting at which all of the stock subscribed or issued was represented, the acts and proceedings of the directors as above were unanimously ratified and confirmed.

The corporation was incorporated for the express purpose of acquiring the properties for the consideration named, with a capital stock of 500,000 preferred shares and 750,000 common shares, all of the par value of \$5.00 per share; and at the first meeting of the subscribers to the stock a code of by-laws was unanimously adopted containing the same provision for the acquiring of the properties for the consideration named.

The directors at the time of the purchase formally declared it the judgment of the Board that the properties were necessary for the business of the corporation and that the value of \$3,995,000 was fair and reasonable.

At the time of the transaction the reports of reliable and competent mining experts showed not less than \$50,000,000 of gold in the mining claims and the statement of that valuation in those reports was at that time believed by Rosene.

The question stated: Was the issue of the 750,000 shares of common stock, full paid and non-assessable, under the conditions and circumstances outlined above, legal?

The Law: The issuance by corporations of bonus stock to promoters has been prolific of much litigation in state and federal courts. We do not propose to enter at length upon a discussion of all of the decisions and attempt to reconcile or distinguish the one with or from the other.

The law applicable to the facts of this case has been settled by the Supreme Court of the United States in the case of *Old Dominion Copper M. & S. Co. vs. Lewisohn*, 210 U. S. 206; and that law so settled is at variance with the law as settled by the state courts of at least Maine and Massachusetts.

The Old Dominion Copper M. & S. Co. was a New Jersey corporation, incorporated July 8, 1895 (136 Fed. 195). The law of New Jersey in 1895 relative to the issuance by a corporation of its stock for property is as follows:

Sec. 213. That the directors of any company incorporated under this act may purchase mines, manufactories or other property necessary for their business, or the stock of any company or companies owning, mining, manufacturing or producing materials or other property necessary for their business,

and the stock so issued shall be declared and be taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments under any of the provisions of this act; and said stock shall be legibly stamped upon the face thereof "issued for property purchased" and in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.

General Statutes of New Jersey 1709-1895, published under authority of the Legislature by virtue of an act approved April 4, 1894 and a supplemental thereto approved March 20, 1895. Jersey City, N. J., Frederick D. Linn & Company, 1896.

The history of the Old Dominion Copper M. & S. Co. litigation arising out of the issue of bonus stock, conducted in Massachusetts to the court of last resort in that state and in the federal courts to the Supreme Court of the United States, is found in the Reports as follows:

In the federal courts:

U. S. Circuit Court, Feb. 24, 1905, 136 Fed. 915;

U. S. Circuit Court, Nov., 1905, (see 195 Fed. 638);

U. S. Circuit Court of Appeals, Dec. 4, 1906, 148 Fed. 1020;

U. S. Supreme Court, May 18, 1908, 210 U. S. 28;

U. S. Circuit Court, Dec. 1, 1911, 195 Fed. 637;
In the state courts of Massachusetts:

Supreme Judicial Court, Jun. 20, 1905, 188

Mass. 315, 74 N. E. 653; Sept. 4, 1908, 199

Mass. 488, 86 N. E. 660; Sept. 4, 1909, 203

Mass. 159, 89 N. E. 193.

Lewisohn and Bigelow, promoters of that corporation, lived the one in New York and the other in Massachusetts, and as it was impossible to obtain service upon Bigelow in New York or upon Lewisohn in Massachusetts, four actions were begun, two against Bigelow in Massachusetts and two against Lewisohn in New York—these were four Bills of Equity, each of them stating in exactly the same language the facts upon which legal relief was demanded, the only difference between the four bills being in the prayer for relief and the names of the defendants. The facts alleged were: That Lewisohn and Bigelow were promoters of and organized, July 8, 1895, the complainant company, owning all of the forty shares nominally subscribed in the preliminary organization. Upon organization, Lewisohn and Bigelow were elected directors; they had previous to July 11, 1895, become owners of mining property of the value of not to exceed \$5,000; on that day the directors of the corporation, Lewisohn and Bigelow, and their dummies on the board under their control, sold and conveyed

to the corporation the mining property for 30,000 shares of its capital stock at the par value of \$25.00 per share; the prayer of the Bill was that the sale of the mining claims be rescinded, the property reconveyed and the shares of stock returned, or an accounting had therefor, or the alternative of rescission, the court to ascertain the amount of damage suffered by complainant and decree therefor.

(Statement by Judge LaCombe, 136 Fed. 915).

On the demurrer to the bill in the United States Circuit Court, Judge LaCombe said:

“Whether the contract for the sale of the real estate was voidable, so as to give the corporation the right to rescind or to demand damages, must be determined under the conditions which existed when it was made. Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary, and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholders or subscriber who is defrauded, since all the profit put into one pocket by the “faithless” directors is taken out of their other pocket as the sole stockholders. This principle is abundantly established by decisions controlling here, so it will be unnecessary to cite numerous authorities from other courts. In *Foster v. Seymour*, (C. C.) 23 Fed. 65, which was decided in this court (Wallace, J.), the facts were very similar, except that the

sale was for scrip, the stock not having yet been issued. The court said: 'There was no fraud on the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there were of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of \$100 each.' And it held that whether or not a subsequent purchaser of stock could recover against those who had misled him—against the corporation or the trustees—'the corporation has no cause of action against the trustees.' Subsequently the same question came before the Court of Appeals in this circuit (*McCracken v. Robison*, 57 Fed. 375, 6 C. C. A. 400), where, as the court expressed it: 'When they entered into the contracts they owned the corporation and all its stock, and represented only themselves. While directors in fact, they were principals in name.' It was held that in such a case the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of their beneficiaries had no application. The demurrer to the bill is well taken, and it is therefore unnecessary to discuss the special demurrer as to defect of parties. The bill is dismissed, with costs.

On appeal, in the United States Circuit Court of Appeals, for the 2nd Circuit, the decree sustaining the demurrer to the bill was affirmed in 148 Fed. 1020, where the decision *per curiam* is as follows:

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by

Bigelow and Lewisohn to the company, Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded, unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them. It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock; but we are not now dealing with the case of a stockholder alleging concealment, fraud, and misrepresentation.

Upon a Writ of Certiorari to the Circuit Court of Appeals, 2nd Circuit, the Supreme Court of the United States in affirming the decrees below, said:

“At the time of the sale to the plaintiff then there was no wrong done to anyone. Bigelow, Lewisohn and their syndicate were on both sides of the bargain and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. (Cases.) If there was a wrong, it was when the innocent public subscribed. But what one would expect to find if a wrong happened then would not be that the sale became a breach of duty to the corporation *nunc pro tunc*, but that the invitation to the public, without disclosure, when acted upon became a fraud upon the subscribers from an equitable point of view accompanied by what they might treat as damages.”

In the case at bar, the wrong, if any, perpetrated

on defendant, as was said by the United States Supreme Court as just quoted, would not be that the sale by Rosene to the plaintiff became a breach of duty to the plaintiff corporation *nunc pro tunc*, whereby the issue of the stock was invalidated, but that the invitation to the public, that is, to the defendant, without disclosure, when acted upon, became a fraud upon defendant as a subscriber.

Defendant's remedy against plaintiff under such conditions would be for damages for fraud and misrepresentation; and in an action against the defendant, on the subscription it was invited to make, its defense would be fraud unless estopped by reason of laches or ratification.

We have discussed elsewhere in this brief the effect of estoppel by ratification on the part of defendant, as well as laches after discovery of fraud, but those questions are not now before us, the sole question under this point being as to the validity of the issuance of the bonus stock.

It is beside the question to urge that the state courts, including the court of last resort of the state of Maine, in passing on the Maine statute, have determined this matter differently.

The U. S. Supreme Court in the case of *Old Do-*

minion Copper M. & S. Co., *supra*, rendered its opinion after the Supreme Judicial Court of Massachusetts had spoken and declined to be governed by that state court.

What was said by Judge Hough, presiding in the U. S. Circuit Court, S. D. New York, in *Old Dominion Copper M. & S. Co. v. Lewisohn*, 195 Fed. 637, when urged to follow the state court ruling, is applicable here: This court owes not only great respect as do other tribunals (to the U. S. Supreme Court) but also—what is much more important—absolute obedience.

This court, in *Min. Co. v. Bank*, 95 Fed. 23, has assented to the doctrine we are contending for by citing approvingly *McCracken v. Robison*, 57 Fed. 375, (C. C. A., 2nd Circuit) to the effect: That directors who own all the stock of a corporation are not within the rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of the beneficiary, and such a contract, made in the name of the corporation by the unanimous consent of the directors, is not invalid, as against public policy.

Instruction No. 16 requested by plaintiff and refused by the court below, embodies the law on the issue of bonus stock as applied to the facts in the case at bar as settled by the U. S. Supreme Court; and,

in the absence of other instructions covering that law, it was error and prejudicial to plaintiff for the court to refuse that request. For that reason we submit that the fifth specification of error is well taken.

There was 750,000 shares of common stock, of which 500,000 shares were transferred to a trustee for the benefit of subscribers to the preferred stock. Whatever part of the preferred stock, total 500,000 shares, was issued and paid for, an equal amount of the common stock was delivered by the trustee to the preferred stock-subscribers. The preferred stock-subscribers would there get just the same share or proportion of the whole capital stock of plaintiff where there was a bonus of one share of common to each share of preferred paid for, as though there were no common stock at all.

The issue of common stock to the amount of 500,000 shares therefore was valid, irrespective of the value of property conveyed therefor, because it was only issued in trust for those subscribers to preferred stock. The excess of the issue, to-wit, 250,000 shares, which went to Rosene and his associate promoters, whether legal or not, does not affect the question raised by this fifth affirmative defense, which is the validity of the 500,000 shares of common transferred to the trustee for the benefit of preferred stock-sub-

scribers, because it is out of the remnant of this trustee stock that the tender of common stock was made in the court below by plaintiff to comply with the terms of the subscription in suit.

We submit that the issue of 750,000 common shares, full paid, as bonus stock was legal; and that the common stock tendered defendant in this action in the lower court, a part of that issue of 750,000 shares, was legally issued and that the tender was in full compliance with the terms of the subscription in suit.

We submit that the sixth and eleventh specifications of error are well taken.

X.

Ratification by Defendant—Estoppel.

The Transfer Books of plaintiff (Ex. E11/14) show that the 750,000 shares of common stock issued on March 30, 1906, to Rosene for the mining property, were issued on April 2, 1906, as follows:

To Rosene	250,000 shares
"	3 shares
Directors to qualify.....	8 shares
A. A. Housman & Co.....	499,989 shares
	<hr/>
	750,000 shares

At a meeting of plaintiff's stockholders on January 23, 1907, at Portland, Maine, Rosene as stock-

holder of 250,003 shares and A. A. Housman & Co., as stockholders of 768,149 shares, common and preferred, were represented by proxy (Ex. D10, Record 46).

The Transfer-Books of plaintiff show that on January 23, 1907, the common and preferred shares issued and outstanding in the name of Rosene totalled 250,003, and that the common and preferred shares issued and outstanding in the name of A. A. Housman & Co. totalled 768,149; and that of the 768,149 shares, common and preferred, in the name of A. A. Housman & Co., the common and preferred shares issued and dated on page 64 of Record produced by defendant in court at the trial (Record, pp. 63, 64) were a part.

At that meeting on January 23, 1907, all shares represented being voted in the affirmative and none in the negative, the acts of the incorporators, stockholders, officers and directors in the issuance of plaintiff's common stock, were in all respects ratified, approved, confirmed and adopted as the valid and binding acts of the plaintiff and its stockholders. (Ex. D10, Record, p. 49).

Of this stock issued and outstanding on January 23, 1907, in the name of A. A. Housman & Co., 25,000 common and 25,000 preferred were owned and held

by defendant, with A. A. Housman & Co., as nominal owners, in trust for defendant.

The principles of a resulting trust where personal property is purchased by one person and taken in the name of another, apply to shares of stock in a corporation.

Creed v. Bank, 1 Oh., St. 1.

The trustee is entitled to vote in respect of stock standing in his name, as trustee of others, and for equally good reason when the trust is not disclosed on the books of the corporation.

10 Cyc. 334 and cases.

The right to vote follows the legal title to the shares.

10 Cyc. 332.

Nor can it be said that the issuance of a proxy by the trustee is a delegation of the trust.

1 Perry on Trusts, Sec. 409.

Where a stockholder participates in the ratification of the issuance of common stock of the corporation, it is estopped from questioning the validity of the issue.

2 Clark & Marshall, on Priv. Corp., Sec. 398.

Washburn v. Paper Co., 81 Fed. 17;

Wood v. Water-works Co., 44 Fed. 146, cited approvingly by this court in *Min. Co. v. Bank*, 95 Fed. 23, at pp. 30 and 34.

The ratification relates back and is equivalent to an antecedent authority.

10 Cyc. 1083,

Fleckner v. U. S. Bank, 21 U. S. 338.

As a stockholder of plaintiff defendant was charged with knowledge of plaintiff's by-laws, including by-law No. 25 (Statement of Case, page 6 of this brief) and is bound by their terms. By-law No. 26 expressly provides for the issuance to Rosene of the common stock full paid in part payment of the mining properties purchased from him; and further provides that no arrangement or contract made on behalf of plaintiff with any director or officer of plaintiff shall be rendered void or voidable by reason of the fact that such officer or director is interested in such contract, and that every present and future stockholder assents to the terms, conditions and circumstances under which the mining properties have been acquired and the shares of common stock issued.

Knowledge of by-laws and notice thereunder to defendant and estoppel by ratification were specially

pleaded by plaintiff in its reply to defendant's amended answer.

XI.

The fourth affirmative defense that the right of action of plaintiff herein did not accrue within six years prior to the commencement of this action, is not sustained by law or facts.

The subscription in suit was made not earlier than April 3, 1906; that was the date of the telegram from Rosene to A. A. Housman, treasurer of plaintiff, at New York authorizing the subscription (Ex. E3, Record p. 50); the subscription itself as executed by Rosene on behalf of defendant was mailed by Rosene to A. A. Housman from San Francisco, April 4, 1906 (Exhibits E1 and E2, Record pp. 50, 53, 54, 77).

This action was commenced in the court below on March 29, 1912 (Record p. 1).

The statute did not begin to run on the subscription in suit until a call was made under it.

Thompson, Corp. Secs. 2002, 2003.

1 Cook, Corp. 6th ed., Sec. 195.

The call was made in the year 1912.

A pleading alleging: "that each and every one

of the said causes of action as alleged in plaintiff's complaint did not accrue within six years before the commencement of this action" was held to contain a negative pregnant in

Gammon v. Dyke, 2 Wash. Ter. 266.

XII.

The attempted repudiation of the subscription in suit by defendant in April, 1907, was without legal effect.

Defendant's board, on April 10, 1907, by resolution affirmed its subscription in the sum of \$125,000 and "no more" and directed its attorney to prepare the necessary notice to be sent by its secretary to plaintiff notifying the latter that no subscription was ever authorized in any sum whatever except for \$125,000. (Ex. I, Record p. 60.)

That resolution and any notice under it were without legal effect for the following reasons:

1st. There was no previous subscription for \$125,000 on behalf of defendant for defendant to thus affirm.

Notwithstanding the language of the resolution of defendant's board of Sept. 5, 1906, authorizing its president to subscribe in the sum of \$125,000 to plain-

tiff's stock, there was no evidence of any such subscription having been made pursuant to that resolution or otherwise.

Rosene, when asked what he did under the resolution of September 5, 1906, so far as the subscription authorized was concerned, answered: "What was the use of subscribing for something which had already been paid, that would be another tomfoolery." And when pressed to state whether he signed another subscription he answered: "I don't know." (Record p. 170).

Kellogg, plaintiff's secretary, testified that he did not know of more than one subscription by defendant, the one in suit. (Record pp. 76, 77).

And Davies, present president of plaintiff, testified to same effect. (Record p. 76).

2nd. So much of the resolution of April 10, 1907, as attempted to repudiate any subscription in excess of \$125,000, came too late. That was a year almost to a day after knowledge of the subscription in suit had been reported by Rosene to defendant's board.

A repudiation to be effective must be timely.

Six months' notice has been held to be untimely and without effect.

Rolling Mill Co. v. R. R. Co., 120 U. S. 256.

A year after knowledge has been held to be too late.

A. & C. Coml. Co. v. Solner, 123 Fed. 855,
C. C. A. 9th Cir.

3rd. There was no proof of notice under the resolution. It is true that defendant's secretary testified that he mailed the notice (Dfdt. Ex. 3) to plaintiff postage prepaid and properly addressed; he admitted that he was not quite sure just when he sent that letter, but it was a matter that was very, very important to them and that notice would have been sent just as quickly as they would receive Mr. Hartman's instructions there; but there was no further proof on the subject, as to when or where he mailed it, or otherwise.

4th. Affirming its subscription on April 10, 1907, in the sum of \$125,000 was an attempt to ratify the subscription in suit to the extent of \$125,000 and "no more," which we have seen could not be done, and which in effect amounted to a ratification of the entire subscription.

We submit there was no repudiation of the subscription in suit in April, 1907.

XIII.

The court erred in entering a judgment or decree in favor of defendant and in not entering a decree in

favor of the plaintiff in accordance with the prayer of its amended complaint.

Twelfth, thirteenth and fourteenth specifications of error.

We submit:

(1st) That the issuance of 750,000 shares of common stock, full paid, to Rosene as a part consideration of the property conveyed by him to plaintiff was a legal and valid issue.

(2nd) That the defendant's board of trustees at its April, 1906, meeting, when the subscription in suit was reported to it, failed to affirm or disaffirm the same and by its silence acquiesced therein;

(3rd) That even if defendant's board at its April, 1906, meeting attempted to repudiate the subscription in suit, it failed to do so in failing to give notice of such repudiation to plaintiff and by consenting to Rosene's disposing of the subscription and of stock represented by that subscription, and by failing to place the plaintiff in *statu quo*;

(4th) That even if the defendant's board repudiated the subscription in suit at its April, 1906, meeting, it failed to adhere to such repudiation at its September, 1906, meeting; and at the latter meeting, at a time when but \$75,000 had been credited upon the

subscription in suit on defendant's books and at a time when plaintiff³ was indebted to defendant, as shown by the latter's books, in the sum of \$17,693 (not taking into consideration the \$75,000 credited plaintiff as above), the defendant ratified the subscription in suit by attempting to ratify it in part, to-wit: to the extent of \$125,000, that being for \$50,000 in excess of what had theretofore been credited plaintiff and being for \$33,000 in excess of what plaintiff then owed defendant, including the \$75,000, assuming that defendant was entitled at that time to charge back to plaintiff the \$75,000 theretofore credited on that subscription;

(5th) That between April 4th and September 25th, 1906, defendant paid plaintiff on account of the subscription in suit the sum of \$125,000 and between April 4th, 1906, and November 9th, 1906, plaintiff issued to defendant and defendant accepted certificates of stock for 25,000 shares common, full paid, and for 25,000 shares preferred of plaintiff therefor; and defendant had notice by its acceptance of said certificates of stock as to its rights as a shareholder of plaintiff and as to the provision and terms contained and specified in the charter and by-laws of plaintiff, defendant thereby consented to, as in said certificates of stock expressly provided;

(6th) That on January 23, 1907, at a meeting of

plaintiff's stockholders at Portland, Maine, at which 25,000 shares common and 25,000 shares preferred of plaintiff, then owned and held by defendant, was represented and voted affirmatively, the purchase of the mining properties by plaintiff from Rosene for \$250,000 cash and issuance of \$3,750,000 common stock, full paid, was ratified and confirmed;

(7th) That no subscription was ever made to plaintiff's preferred shares in the sum of \$125,000 on behalf of defendant and no payments were ever made by defendant on account thereof;

(8th) That the plaintiff at no time released the defendant from its liability under the subscription in suit;

(9th) That the attempted repudiation of the subscription in suit by defendant in April, 1907, a year after it was reported to defendant, was without legal effect;

(10th) That the plaintiff's right of action accrued within six years next preceding the commencement of this action;

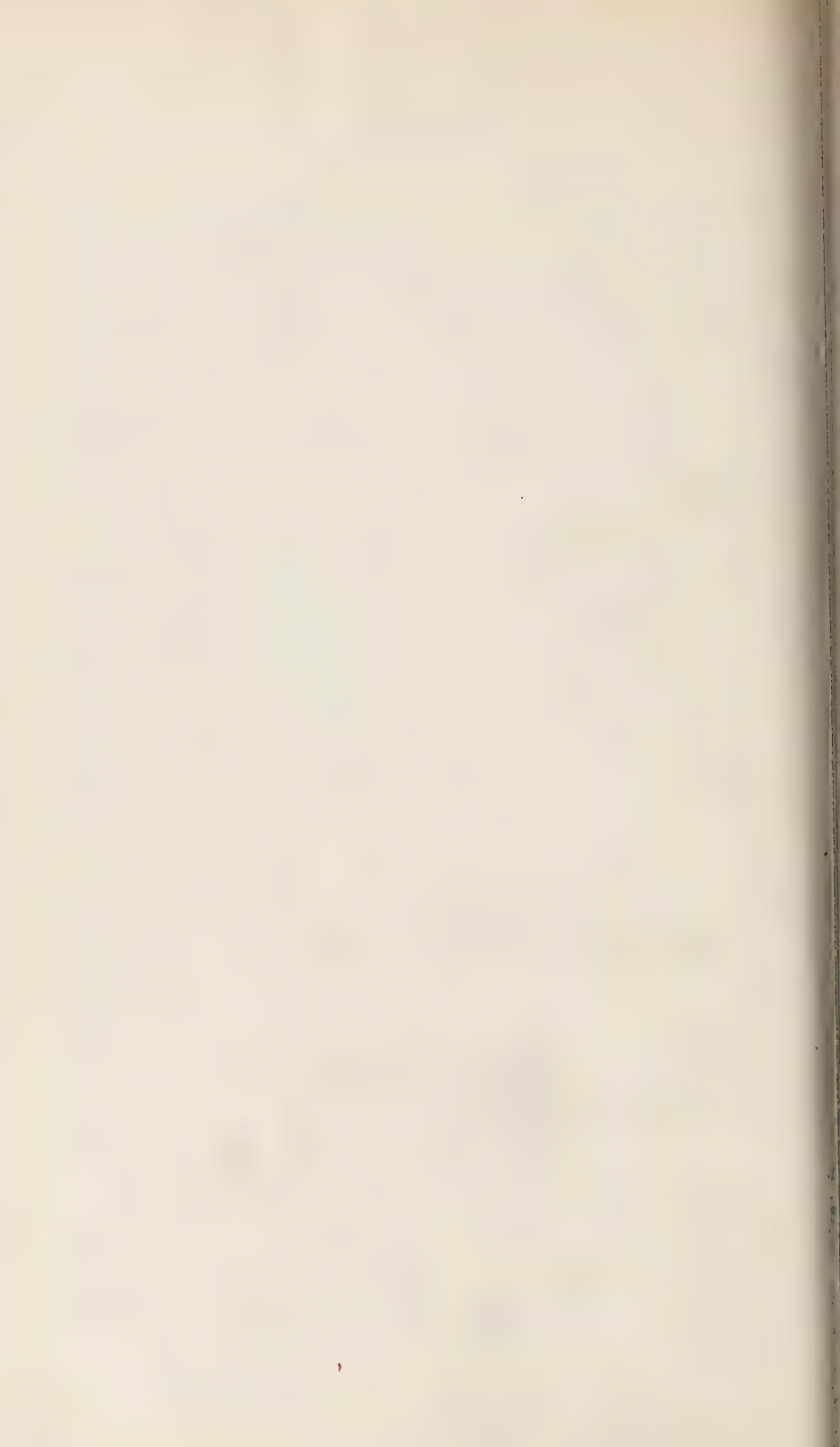
(11th) That defendant for more than three years next preceding the commencement of this action, to-wit: from and after the month of October, 1908, had

knowledge that out of the issue of plaintiff's 750,000 common stock, full paid, as part consideration for said mining properties conveyed to it, 250,000 shares were retained by Rosene and his associates as a personal profit to themselves.

And for these reasons we submit that the twelfth, thirteenth and fourteenth specifications of error are well taken.

The judgment of the lower court should be reversed and a judgment or decree should be entered in accordance with the prayer of plaintiff's amended complaint and for costs of this appeal.

WILLIAM H. GORHAM,
Attorney for Appellant.



In the United States Circuit Court of Appeals

For the Ninth Circuit

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY,
a Corporation,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT.

This is an action at law to recover from the appellee upon an alleged contract of subscription to the preferred capital stock of the appellant. Appellant was organized in March, 1906, under the laws of the State of Maine. The appellee, which is a corporation organized under the laws of the State of

Washington, had been engaged in business in Seattle, Washington, and Alaska for a number of years prior to 1906. It conducted a mercantile business in Nome, Alaska, and owned all of the capital stock of the Northwestern Steamship Company, a corporation engaged in carrying freight and passengers between Puget Sound and Alaska, and also owned the capital stock of the North Coast Lighterage Company, engaged in the business of lightering cargo from ships' tackles to shore at Nome, Alaska. John Rosene was president of the appellee company. It appears from his testimony that he was also more or less active in other business lines and speculations of his own. In November or December, 1905, and January, 1906, Rosene had been approached by one L. H. French in the endeavor to interest him in a scheme to sell a large number of so-called mining claims in Alaska, in which French appears to have been interested, and also to finance some railroad schemes in Alaska which French was trying to float. It appears from Rosene's testimony that he did become interested in French's schemes either before or very soon after he reached New York in January or February of 1906. Rosene took the matter up with one A. A. Hauseman, who was a private banker on Broad Street, New York, being the head of the firm of A. A. Hauseman & Co., and who was apparently an intimate acquaintance and associate of Rosene. Through Hauseman, certain

parties representing or purporting to represent English capital were interested in the scheme, and it was finally agreed that a corporation would be organized by Rosene and Hauseman and their associates to take over these properties and construct a railroad. In the meantime, it had been agreed by the owners of the mining property that they would sell the property to the company for \$245,000, cash. French, apparently, had some interest in the mining property, although the record does not make it very clear as to what his interest was. Apparently, he was representing all of the mine owners in an endeavor to make a sale of the claims as a whole, probably on a basis of a commission. At any rate, it was agreed between all the parties that the new company to be organized would buy the mining properties and water claims for a consideration of \$245,000. (Record, pp. 127-8.) Rosene claims that he had no real interest in the mining properties, although it appears from his testimony that either prior to the time he went to New York or very soon after reaching there and before the plan for organizing the appellant corporation had been made, he had paid French \$20,000, either for an interest in the mining claims or for a share in the profits which French was making by negotiating the sale. (Record, p. 162.)

Rosene, Hauseman and their associates thereupon proceeded to organize the appellant corporation. It was organized with a capital stock of \$6,250,000, di-

vided into \$2,500,000 of preferred stock and \$3,750,000 of common stock. Rosene agreed to subscribe \$250,000 on behalf of the appellee corporation to the preferred stock of the appellant, and also agreed to subscribe \$50,000 upon his own behalf, personally. Hauseman also agreed to subscribe for \$50,000 of the preferred stock. Rosene, Hauseman and French, as promoters of the appellant corporation, agreed among themselves that they would divide up among themselves \$1,250,000 of the common stock as a bonus, and that the balance of the common stock would be placed in the treasury and issued as a bonus to subscribers to the preferred stock. When they came to organize the corporation, according to Rosene's testimony, one McConnell, who seems to have been the real representative of the majority of the owners of the mining property, refused to accept the obligations of the proposed corporation for the \$245,000, but was willing to accept Rosene's personal obligation; and Rosene claims that the various mine owners conveyed all of the interest in the mining property to him, and that he immediately conveyed it to the corporation, and that this was done because of the insistence of McConnell that he must have Rosene's personal obligation for the \$245,000. (Page 129.)

It further appears from the testimony of Rosene that the lawyers who were managing the organization of the appellant corporation advised that it was neces-

sary to have the corporate resolutions recite that the consideration for the mining property was \$245,000 in cash and \$3,750,000 of the common stock; it being explained, as Rosene claimed, that this was necessary in order to enable them to distribute the common stock as a bonus in the manner in which they had agreed among themselves. (Record, pp. 128, 131.)

A resolution was passed by the board of directors of the appellant company immediately after organization, authorizing the purchase of this mining property for the \$245,000, cash, and the \$3,750,000 common stock. There was a proposition made by Rosene to the company to convey the mining property, which was drawn along this theory that the purchase price of the mining property was \$3,995,000. Rosene immediately gave back to the corporation an agreement that out of the \$3,750,000 common stock received by him, he would turn back to the treasurer of the company \$2,500,000 thereof, to be issued as a bonus by the company thereafter to subscribers to the preferred stock, and this was done. (See Exhibits Plaintiff's Minutes in March, 1906.) The remaining \$1,250,000 common stock was deposited with A. A. Hauseman or A. A. Hauseman & Co., who held it under some kind of a pooling agreement between Rosene, Hauseman and French.

It is shown clearly by the testimony that at the time of the organization of the appellant company and

of the passage of the resolution by its board of directors for the purchase of this mining property for a consideration of \$3,995,000, the board of directors was a board composed of Hauseman, French, Davis, Pierce and Rosene, all of whom either shared in the bonus or were representing the participants. None of them, except Rosene and French, had ever been to Alaska and, of course, had not seen any of the mining property, and never in fact undertook to place any valuation upon the property. (Record, p. 132.)

Soon after the organization of the appellant corporation, Rosene left New York, going first to San Francisco, from which place he seems to have forwarded to Hauseman a contract of subscription to the preferred stock of the appellant, signed by him on behalf of the appellee, for \$250,000. He returned to Seattle soon thereafter, being early in April, 1906. The board of trustees of the appellee company at that time was composed of John Rosene, M. Thomsen, H. W. Treat, J. D. Trenholme, Captain D. H. Jarvis (since deceased), and one McLaren (since deceased). A few days before Rosene reached Seattle, Mr. Trenholme had heard from some friend of his that the appellant corporation had been organized and that Rosene had subscribed for \$250,000 of its preferred stock on behalf of the appellee. Immediately upon the arrival of Rosene in Seattle, Trenholme, who was secretary of the appellee, secured a meeting of the trustees, having

in the meantime discussed the matter with both Thomsen, Treat and Jarvis. They had agreed among themselves that they would not permit Rosene to commit the appellee to any such subscription, and Mr. Treat had requested Mr. John P. Hartman, who was then the attorney of the appellee, to be present at this meeting for the purpose of drawing up proper resolutions repudiating the subscription. When the meeting convened, Rosene reported that he had made a subscription to the appellant's preferred stock on behalf of the appellee in the amount of \$250,000, and had paid \$50,000 thereon. Each and every member of the board of trustees present expressed dissatisfaction at this action. Mr. Hartman, upon the request of Mr. Treat, drew up a resolution repudiating the subscription, and this resolution was introduced and passed unanimously, Mr. Rosene himself not voting. Rosene thereupon importuned the board not to place the resolution upon its records, stating that the applications for the stock of the appellant company were far in excess of the amount of stock, and that he would immediately place the stock with other subscribers and would reimburse the company for the \$50,000 which had been already paid. He was at that time managing director of the appellant company. He claimed that if the resolution of repudiation was actually spread upon the minutes of the appellee company it would discredit him in the business world. Mr. Treat thereupon asked Mr. Hart-

man, the company's attorney, whether the resolution as passed by the board would have the same legal effect if it was left off the records as if it were recorded, and Hartman advised that the legal effect would not be changed by omitting the resolution from the records. Thereupon, by unanimous consent of the board, the secretary was directed not to record the resolution. (Record, pages 80, 93, 104.) The exact date of this meeting does not appear in the records, for the reason that no minutes of the meeting were made, the passage of this resolution repudiating the subscription being the only business transacted; but it is clear from the testimony that this repudiation by the appellee's board took place some time early in April, 1906.

Within a very short time thereafter, Mr. H. C. Davis, who was a partner in the firm of A. A. Hauseman & Co. of New York and president of the appellant company, was in Seattle, and Mr. Trenholme, the secretary of the appellee company, reported to Mr. Davis that the appellee had repudiated this subscription, and that Rosene had no authority to make it. Nothing further came before the board of trustees of the appellee respecting this subscription until September 5, 1906. It then transpired that Rosene had not returned the \$50,000 which had been paid by him out of the appellee's funds to the appellant and that an additional \$25,000 of appellee's funds had been applied by Rosene without the knowledge of the board

toward this subscription. It appears that the appellant was shipping large quantities of merchandise from Seattle to Nome by the steamers of the Northwestern Steamship Company, owned by appellee, and in July was largely indebted to the appellee, either upon account of freights or upon advances made by Rosene on behalf of the appellee to the appellant. In this condition of the accounts, Rosene, without the knowledge of the board of appellee, instructed M. M. Perl, its auditor, to credit the appellant on its account with the appellee with the sum of \$25,000, as of July 15, 1906, and charge to the account of the subscription. This direction of Rosene to Perl is shown by pages 106 and 113 in the Record.

In the transaction of its business in Alaska and Seattle, Rosene, who was the managing director of the appellant as well as the president of the appellee, permitted the representatives of the appellant in Nome to draw either on him or on the appellee at Seattle for large sums of money from time to time as they were needed by appellant, and the auditor Perl, under private instructions from Rosene, would pay these drafts out of the funds of the appellee, and charge them to the appellant's account. On August 31st, 1906, when the accounts were balanced, the appellant was indebted to the appellee in the sum of something over \$57,000, in addition to the \$50,000 which Rosene had paid in April, and the \$25,000 which Perl, under his instruc-

tions, had credited to the appellant on July 15th. (See Exhibits "K" and "K-1.") When the board of trustees of the appellee met on September 5th, 1906, this was the condition of the accounts. A general discussion of the situation was precipitated, Rosene insisting that the appellee should become a subscriber to some amount of stock in the appellant company, while the majority of the board were opposed to taking any stock. The board finally agreed, in order to compose all of these disputes, that it would authorize the president to make a subscription to the preferred stock of the appellant in the amount of \$125,000; it being understood and agreed that the moneys previously turned over to the appellant, that is, the \$50,000 paid by Rosene in April, and the \$25,000 credited in July, and \$50,000 of the \$57,000 still owing to the appellee from the appellant, as shown by the accounts as balanced on August 31st (see Exhibits "K" and "K-1"), should be applied in payment of the subscription thus authorized by the board. (Record, pp. 81-2, 95, 105-6.) It is shown by the testimony that Rosene, who was chairman of the board of directors of the appellant, assured the board of trustees of the appellee at that time that this would be accepted by the appellant in full adjustment and settlement of all disputes between them. Soon afterwards, that is, early in October, 1906, Rosene went to New York and at a conference with Hauseman, Henderson, Davis and Pierce (who with

Rosene constituted the board of directors of the appellant at that time), reported that he had practically forced the board of trustees of the appellee to agree to subscribe to \$125,000 of the stock of the appellant, to be paid for by the application of the moneys as above set out, and that the appellee would not stand for the subscription made by him during the preceding March, and was authorizing this new subscription as a full settlement and disposition of the whole matter. Davis, Hauseman and the other directors of the appellant assented to this arrangement, stating to Rosene that other subscriptions made at the time of the organization had also been canceled and that this settlement was acceptable (Record, p. 134-5). While this meeting does not appear to have been a formal directors' meeting, it does appear that the conference took place in the directors' room of the appellant in the office of A. A. Hauseman & Co., and that the president and treasurer and all of the directors of the appellant (with the possible exception of one member) were present and assented to this adjustment.

In April, 1907, the appellee received a notice from the secretary of the appellant of an assessment of 10 per cent upon the original Rosene subscription. The appellee board of trustees thereupon passed another formal resolution directing its officers to notify the appellant that the appellee had never made any subscription to its capital stock, except in the sum of \$125,-

000 (which, of course, referred to the subscription authorized in September, 1906), which had been fully paid, and that it was not indebted to the appellant in any sum whatever (Record, p. —). A copy of this resolution was transmitted by the secretary of the appellee to the appellant with a letter fully explaining appellee's position (Record, p. 107; Exhibit No. 3). No other claim was ever made by the appellant against the appellee on this subscription until the summer of 1910, after the death of both Davis and Hauseman. At that time the appellant made an assessment against the appellee and gave notice thereof. The appellee immediately, through its attorneys, by letter denied any indebtedness or liability to appellant, and again notified them that the appellee had promptly repudiated Rosene's subscription (Exhibit No. 2). Soon thereafter the appellant commenced suit against the appellee upon the alleged Rosene subscription and the appellee denied all liability. When the case came on for trial, after introducing some of its testimony, the appellant took a non-suit. Thereafter new proceedings were taken by appellant levying an assessment on the Rosene subscription, and this suit was instituted thereon.

One E. J. Matthews became the president of the appellant company in the year 1908. (Record, p. 76.) He testified that when he became president he was informed or knew that the appellee had or claimed

that it had repudiated the Rosene subscription. (Page 76.)

The record shows clearly and beyond any question of dispute that Rosene had no authority from the appellee to make the subscription, and that appellee immediately upon learning that he had made such a subscription repudiated it and has constantly denied liability from that time down to the present. When the case was tried in the court below, the trial judge instructed the jury in substance that Rosene had no authority to make the subscription and submitted to the jury the question whether the appellee had affirmed or repudiated the subscription either expressly or by its conduct; and also, in case they found that appellee had ratified the subscription, he submitted to them the further question whether the common stock which appellant had tendered in court to appellee had been paid in cash or property at a bona fide and fair valuation, as required by the Maine statutes. The verdict of the jury, of course, settles these questions of fact in favor of the appellee. No exception was taken by the appellant to these instructions. It claims that it requested a special instruction, No. 16, which was in part inconsistent with the general charge. The requested instruction is not brought up by the record, and therefore its correctness cannot be considered.

ARGUMENT.

In discussing the questions involved, we will follow the assignments of error as found in the record, rather than the order of discussion followed by appellant in his brief, for the reason that we think appellant has discussed many questions that were not raised by his assignment of errors.

I.

The first error assigned is the action of the Court in sustaining the objection of the appellee to the introduction in evidence by appellant of its Exhibits marked "E4," "E6," "E8," "E9," and "E10," Exhibit "E5" is also mentioned in the assignment of error, but the record shows that that exhibit was admitted in evidence.

The ruling of the Court covered by this assignment is found on Record, pp. 53 and 54. The exhibits referred to were letters passing between various officers of the appellant corporation transmitting documents or records from one to the other, and with which appellee was in no wise connected. The ruling was manifestly correct. The Court will also observe that no exception was taken by appellant to the ruling. Therefore, error cannot be predicated thereon.

II.

The appellant offered in evidence the stipulation between the attorneys for the companies, dated May

11, 1914, relative to certain proposed amendments to the pleadings as they then stood (Record, pp. 69-70).

It will be noted that the document offered in evidence referred to the pleadings as they stood in 1914. Subsequent to that time, the complaint was amended and the amended answer was filed and the case was tried under the issues as made in these amended pleadings. This amended answer denied the issuance of this stock by the plaintiff to the defendant between the dates mentioned in the stipulation. The document offered in evidence, therefore, was not the pleading on which the case was tried, but a stipulation by counsel relating to previous pleadings, and at most amounted to merely an admission by counsel of a fact denied by the defendant in its subsequent pleadings.

It will be noted that the pleading as amended under the stipulation was not offered in evidence, and there is nothing in the record to indicate that the pleading of the defendant was in fact ever amended so as to contain the admission claimed to be contained in the stipulation.

It is true that admissions made by attorneys for their clients are sometimes admissible against the client where they are made by the attorney for the express purpose of waiving or obviating the necessity of formal proof and the other party has relied upon the admission. In this case, however, the amended

answer subsequently denied the delivery of this stock within the dates mentioned, so that it cannot be claimed that plaintiff was in any wise misled by any supposed concession or admission previously made by attorneys for the defendant; and we think it is generally true that a formal stipulation or admission made by attorneys for a party for some collateral purpose is not admissible as proof of any fact therein stated upon the trial of the case, particularly where the issues are made up subsequently thereto.

Murray v. Chase, 134 Mass. 92.

We believe the rule is also settled in the Federal Courts that prior pleadings in a case which are not sworn to by the party but signed only by the attorneys, are not admissible on the trial as evidence against the client, upon the issues made by the amended pleadings.

In the case of *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 487, a former complaint in the action, not under oath or signed by the parties themselves, but by the attorneys, was offered in evidence as an admission of certain facts therein contained, and in sustainig the ruling of the Court below in rejecting the evidence, the Court said:

“The former complaint, not under oath, nor signed by the plaintiff, but only by its attorneys, was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant. *Combs v. Hodge*, 21 How. 397; *Pope*

v. Allis, 115 U. S. 363; *Dennie v. Williams*, 135 Mass. 28."

In all of these cases it is expressly held that pleadings in another case or original pleadings in a case where pleadings are subsequently amended, are not admissible as admissions against the party unless they are sworn to or signed by the party himself or there is other evidence to show that the client in some way approved the admission made by the attorneys in the pleading.

The stipulation offered in evidence in the present case relating to former pleadings is not sworn to, but signed by attorneys only, and there was no offer of any evidence to show that the client had any knowledge that the stipulation was ever entered into by the attorneys; nor is there any evidence that the matters contained in the stipulation were ever actually embodied in any former pleading filed in the case. Under the Statutes of Washington all pleadings must be verified, and the matters contained in this stipulation could not have been embodied into any pleading so as to become a formal pleading in the case without the verification required by the statute.

We insist further, however, that even if this document was technically admissible, it had no material bearing upon the issues in the case. The board of trustees of the defendant company, on September 5,

1906, authorized a subscription to be made by that company for \$125,000 preferred stock of plaintiff. This stock was paid for by applying the \$75,000 previously turned over to plaintiff by Rosene, or under his instructions, and by the additional credit of \$50,000 made upon the account of the plaintiff with the defendant on September 5, 1906. When Rosene was in New York in October thereafter, this arrangement was expressly assented to by the president and treasurer of the plaintiff and by all of its directors, with the possible exception of one. The defendant thereupon became immediately entitled to receive from the plaintiff \$125,000 of its preferred stock. An admission, therefore, that it did receive that amount of stock from the plaintiff prior to November 9, 1906, had no tendency to show a ratification of the Rosene subscription of April, 1906, for \$250,000. This is particularly true in view of the statement in the stipulation that the 25,000 shares of stock of plaintiff which defendant received represented the stock which had been paid for by the \$125,000 which Rosene had paid out of defendant's funds to plaintiff. The testimony shows that \$50,000 of that amount was paid after the board meeting of September 5, 1906, showing conclusively that any admission of the receipt of stock paid for by that money must have referred to a receipt subsequent to September 5, 1906.

The testimony introduced upon the trial of the cause shows conclusively that the admission which the attorneys for the defendant proposed to make in this stipulation was inadvertent and not true in fact. The original certificates received by the defendant were introduced in evidence. They are tabulated on page 73 of appellant's brief. They were apparently issued at various times to A. A. Hauseman & Co. and were not assigned to the defendant until September 24, 1907. Therefore, the statement in the stipulation that between April 4, 1906, and November 9, 1906, "plaintiff issued to, and defendant accepted, 25,000 shares of the preferred capital stock of plaintiff" is manifestly incorrect.

In this connection, the appellant in his brief refers to Exhibit "N," being a letter dated April 18, 1906, from Rosene to Henderson, requesting Henderson to obtain 12,000 shares of the preferred stock from the plaintiff company and send to Rosene. Rosene apparently contemplated that the shares of stock would be issued to him, crediting the amount thereof on the \$245,000 due him for the mining property. There is nothing to indicate that this stock was issued to Rosene as requested, and, in any event, Rosene testified that this letter was written without the knowledge of the defendant's board of trustees. (Record, p. 69.)

The certificates themselves which were produced

on the trial show that they were not issued to the defendant or to Rosene. Reference is also made by appellant, on page 75 of his brief, to Exhibit Number 3, which was a letter from Hartman, attorney for defendant, to the company, giving form of letter to be sent by the secretary of the company to the plaintiff, notifying the plaintiff of the action of the defendant's board on April 10, 1907, reaffirming its repudiation of Rosene's subscription. Mr. Hartman in writing the letter was apparently under the impression that the \$125,000 of stock authorized by the resolution of the board of trustees on September 5, 1906, and paid for in full at that time by the arrangement then made, had actually been issued to the defendant company. In this matter he was apparently in error, but in any event, the stock he refers to, whether it had been issued or not, was the stock authorized by the resolution of September 5, 1906. In the same connection, in appellant's brief, reference is made to a resolution of defendant's Executive Committee on September 18, 1907, directing that proxies be sent to Mr. Eccles to represent the company and to have the stock owned by the company re-issued in its name. Evidently this also refers to the stock authorized in the September 5th resolution.

Taking the record as a whole, it is manifest that all references made in any of the minutes of the com-

pany to any stock owned by it in the plaintiff, and all references made in either the letter dictated by Hartman or in the stipulation relating to the amendment of the pleadings, had in mind the stock authorized by the board in September, 1906. Whether that stock was actually issued to the defendant prior to November 9, 1906, is immaterial. Any admission that it was so issued would have no probative force in proving ratification by the defendant company of the Rosene subscription of April, 1906, for \$250,000.

We, therefore, submit, first—that the stipulation offered in evidence was not admissible because not sworn to or signed by the defendant; and, second—that even if it was admissible, its rejection was not prejudicial to the plaintiff.

III.

Error is assigned upon the ruling of the Court sustaining the objection of appellee to the introduction of evidence of the minutes of the Executive Committee of appellee of October 23, 1907 (Record, p. 63). The record does not set out these minutes and it is, of course, impossible for the Court to determine whether the ruling of the Court in excluding them was correct or not. The appellant in his brief and in his assignment of error (p. 198) sets forth what purports to be a copy of these minutes. We submit, however, that neither the assignment of error nor the appel-

lant's brief can be used to supplement defects in the record.

Jones v. Buckell, 104 U. S. 556.

The record itself should have shown the evidence if he contemplated assigning error thereon.

If the minutes were as set out by appellant in his brief, however, it is perfectly manifest they were wholly irrelevant and immaterial to any issue in this case. The fact that the Executive Committee requested that Mr. Rosene be asked to resign his office as president in October, 1907, can have no possible bearing upon his authority to make this subscription, or upon the question of ratification or repudiation thereof by the board in 1906.

IV.

Error is assigned upon the action of the Court in over-ruling the objection of appellant to the question alleged in the assignment to have been put by the appellee to the witness H. W. Treat, the question and answer being copied in the assignment. No such question or answer appears in the record. On page 93 of the record, in the testimony of Treat, appears the following:

"That the defendant's board of trustees, at any meeting attended by witness, did not authorize Mr. Rosene to subscribe for stock in plaintiff company, prior to the board meeting of September 5, 1906."

That is the only reference found in the record to the matter referred to in this assignment of error. The Court will observe that the record shows that no objection was made by the appellant, nor ruling of the Court invoked, nor any exception reserved. There is manifestly nothing in this testimony upon which the appellant can base an error.

V.

Error is assigned upon the action of the Court over-ruling the objection of appellant to the following question put by appellee to the witness Treat on direct-examination, to-wit:

“State what took place before the board at the time when those resolutions were adopted.”

The matter referred to is found on page 95 of the record. Objection was made to the question upon the ground of incompetency alone. Appellant has not discussed this assignment of error in his brief, and we, therefore, assume that he is not relying upon it. The meeting of the board referred to was the meeting of September 5, 1906, at which a resolution was passed authorizing the president to subscribe for \$125,000 of stock of the company. The resolution recites that:

“The question of Mr. Rosene’s subscription to the stock of the Northwestern Development Company was fully discussed and Mr. Thomsen introduced the following resolution, etc.”

The appellant himself had previously interrogated his witness Thomsen as to what had occurred at this meeting (Record, pp. 73-74). It was, therefore, competent for the appellee by its own witnesses to show its version of what occurred at the meeting. Aside from this, however, the resolution itself recites that a general discussion took place, which resulted in the resolution offered by Mr. Thomsen and adopted by the board.

It was manifestly competent for the appellee to show the facts and circumstances connected with this resolution. The testimony was not offered to contradict the record, but to explain the nature of the discussion referred to in the record, and the circumstances surrounding the action of the board.

Tibballs vs. Company, 10 Wash. 329.

Even if the ruling was technically incorrect, it is manifest that the answer of the witness was in no wise prejudicial to the appellant. He stated in substance what had previously been stated by appellant's own witness Thomsen on direct and cross-examination and without objection by either side.

VI.

Error is assigned upon the action of the Court in over-ruling the objection of appellant to the question put by appellee to its witness Trenholme (Record, pp. 103-4). The witness was asked:

“Did the board of trustees at any time ratify any subscription made by Mr. Rosene to the capital stock of plaintiff outside of the subscription authorized at that meeting of September 5, 1906?”

The witness had already testified that he had attended all of the meetings of the board between the middle of March and the 5th of September, 1906. It had also already appeared that at one of these meetings, held in April, no minutes were made of the proceedings. The minutes of the appellee's board were in Court at the time this question was asked, and it had been shown that there was no entry upon the minutes of the board showing any ratification or in any wise referring to this Rosene subscription, except the minutes of September 5, 1906, and the minutes of April 10, 1907. The appellee desired and evidently was entitled to show that the board of trustees of the appellee company had not at any time ratified the subscription of Rosene. It already appeared that the board had not ratified by any resolution appearing upon its minutes. The question was intended to show further that the board had not ratified the subscription at any time. Appellant makes this admission (page 71 of Brief):

“What the board did, whether of record or not, was a pertinent inquiry; but the question as framed called for the conclusion of the witness and was objectionable on that ground alone; further it was objectionable on the ground of not being the best evi-

dence; for the minutes are the record of the transactions of the board and the best evidence of those transactions.”

Whether the board had in fact ratified the subscription was a question of fact. There might be a course of conduct on the part of the appellee in its business dealings and transactions with the appellant which would be held in law to be an acquiescence in or ratification of the subscription, and be binding as such upon the appellee; but the question put to this witness was whether the board of trustees had ratified the subscription. As stated above, the minutes were present, and it affirmatively appeared that no such ratification appeared upon the minutes. There was no way open to the appellee to prove affirmatively that the board of trustees had not ratified the subscription except to prove it by some competent witnesses who had been present at all of the meetings of the board. The question, manifestly, did not call for any conclusion of the witness, but for the fact. If the question had been whether the appellee had by affirmative action or otherwise ratified the subscription, the question might have been open to the objection now raised; but as the question related to action by the board of trustees, who can only act when meeting as a board, the objection was manifestly untenable. The board could act only when in session as a board. The witness had testified that he was present at all of these

meetings. Any action by the board would be a positive action either ratifying or repudiating the subscription, and whether it had done the one or the other at any of these meetings attended by the witness was a question of fact.

VII.

Error is assigned upon the action of the Court over-ruling the objection of appellant to the question put by the appellee to its witness Trenholme as to whether he had notified the president of the appellant of the action of the board of trustees of the appellee company at its April meeting in repudiating the Rosene subscription (Record, p. 105). The contention made by the appellant is that notice to Davis under the circumstances was ineffective, for the reason, as it is claimed, that the main office of the appellant company was in New York, and Davis, its president, being in Seattle at that time, was presumably not here on the business of his company, and that notice to him under those circumstances would not be notice to the company. The objection made by appellant to the question was upon the sole ground that it was incompetent. We do not think that the objection is sufficiently definite to raise the question discussed by appellant in his brief (p. 41).

It appears from the record that the appellant company was organized under the laws of the State of

Maine and that its board of directors had an office and place of meeting in New York; that the appellant also had an office in Seattle, where a large part of its business was transacted, consisting of the purchase of goods and the shipments to Alaska; and, further, that its main business transactions were carried on in Alaska. Davis was president of the company and resided in New York. He was in Seattle at the time of this interview and had been here for some little time. It was certainly competent for the appellee to prove that the president of appellant company was notified of the action of the board of trustees of the appellee company in repudiating the Rosene subscription. If the objection to the question was intended to be based upon the claim that Davis, although president of the appellant company, was in Seattle at the time on personal business not connected with his company, and therefore the notice to him would not be notice to the appellant, the objection should have disclosed that ground. The objection to the question on the ground of incompetency does not raise that question at all. If appellant had indicated that his objection was based upon that ground, the appellee could or might have been able to meet the objection by proof that Davis was here on business of his company.

Choctow etc. Co. v. McDade, 191 U. S. 64;
Moore v. Bank, 13 Pet. 302;
U. S. v. McMasters, 4 Wall. 680;

Evanston v. Gunn, 99 U. S. 660;
Atkins v. Elwell, 45 N. Y. 753;
Nofts v. Smith, 32 N. E. 1024;
McKaisie v. Association, 53 S. W. 1107.

If notice to Davis was not notice to his company because of the fact that he was disassociated from his company at the time, an objection would be upon the ground of the materiality of the evidence rather than upon the ground of its competency.

It is manifest, however, that the objection, even if made upon the ground now argued by appellant in his brief, was not well taken. It was not a case where an agent of a company, when away from the place of business of the company, and on his own business or pleasure, incidentally acquired knowledge of some fact, which he might or would forget before he could report it to his company. On the contrary, Davis was presumably in Seattle on the business of his company, because a large part of the company's business was transacted in Seattle. There is nothing in the record indicating that he was in Seattle on any other business. The notice given to him was direct notice of the action of the board in repudiating this subscription. He was the proper officer to receive such notice. It appears from other parts of the record that Davis communicated this knowledge to other officers of the appellant company, and Rosene testified that when he held his conference with the officers and directors of

the appellant company in the succeeding October, he found that they all had notice prior to that time of the repudiation of this subscription (Record, pp. 134-5).

VIII.

Error is assigned upon the refusal of the Court to give instruction Number 16, as requested by appellee. This error cannot be considered by this Court, for the reason that this alleged instruction Number 16, as requested by appellant, does not appear in the record at all. The record (p. 191) shows that after the Court had given his general instructions, the appellant's attorney requested him to give instruction Number 16, as filed by the appellant. Whereupon, the proceedings as shown by the record were as follows:

“THE COURT: The plaintiff requests me to give this instruction. This is in substance what I have stated to you, but I will read it.

The plaintiff had the legal right to issue all of its common stock to John Rosene in part consideration of the conveyance by Rosene to it of certain mining properties and water rights, provided that all of its then stock subscribers concurred therein. And if you find that all of plaintiff's common stock was issued to John Rosene for such properties, with the concurrence of all its then stock subscribers, and all of the holders of its capital stock then outstanding—I will modify that—provided they acted in good faith in the matter and were not guilty of actual fraud in the transactions as I have already instructed you, then such issue was legal.

MR. GORHAM: We desire now to note an exception if the Court please, for the failure to give particularly instruction number 16 as among the requests of the plaintiff.”

That is the entire record. It is inferable from the language used by the Court that a part of the instruction as there given by him was instruction number 16, requested by appellant, and that the Court modified the instruction as requested in some respect; but it is impossible to say that that modification was error, or that there was some other part of the instruction which should have been given, in the absence of any showing in the record as to what the instruction requested was.

Appellant has sought to incorporate the supposed requested instruction Number 16 into the record by including it in his assignment of error Number VIII (Record, p. 199). Manifestly, however, this assignment of error is no part of the record of the proceedings before the Court and the Court cannot consider the propriety of a requested instruction which does not appear in the record, but is shown only in the assignment of errors.

Dunlop v. Monroe, 7 Cranch 242,
Jones v. Buckell, 104 U. S. 556.

IX.

The remaining assignments of error numbered IX to XVII, inclusive, seek in various forms to raise the question whether there was substantial evidence to sustain the verdict of the jury.

We respectfully submit that these assignments present no question of law for review by this Court. There was no exception taken by the appellant to the instructions of the Court to the jury. There was no challenge of the sufficiency of the evidence to establish these defenses by a request for a peremptory instruction for a verdict in favor of the appellant or by either request for an instruction or a motion to take either of the affirmative defenses from the jury. The record shows no motion for a new trial based upon the evidence.

In the recent case of *Dunsmuir v. Scott*, 217 Fed. 200, this Court held that in the absence of some challenge as to the sufficiency of the evidence by a motion to withdraw the case from the jury, or for a peremptory instruction, the Appellate Court was limited to a review of the rulings of the Court to which exceptions were reserved during the progress of the trial, and could not consider whether as a matter of law the evidence was sufficient to sustain the verdict of the jury. We, therefore, submit that these assignments of error present no question for this Court.

X.

The appellant (Brief, p. 94) has submitted a rather elaborate argument justifying the issuance of bonus stock by corporations, and contends that the case of the *Old Dominion Copper M. & S. Co. v.*

Lewisohn, 210 U. S., holds that such issues are legal when consented to by the corporation itself and all of its stockholders at the time the stock was issued. That case holds that where a corporation issues stock in payment for property, with the knowledge and consent of all of its officers and stockholders, the corporation itself cannot subsequently maintain a bill in equity to rescind the transaction upon the ground that the property was not of a value equal to the par value of the stock, even though there has been a change in the personnel of the stockholders between the time of the issuance of the stock and the time of the commencement of the action. In other words, the Court holds that where a corporation and all of its stockholders entered into a contract for the purchase of property to be paid for by the issuance of its stock, the transaction is valid as between the parties and that a subsequent change in the personnel of the stockholders does not vest the corporation with the right to rescind what it had previously assented to.

A corporation unquestionably derives its powers from the laws of the state in which it is incorporated. If the laws of the State of Maine had denied corporations organized under the laws of that state the power to issue capital stock in payment for property, we apprehend that no one would claim that an executory contract made by a corporation with a third party to

issue stock to that party in payment for property would be enforceable by the corporation.

Section 50 of Chapter 47 of the Statutes of Maine of 1904 authorizes a corporation to purchase property and to issue stock "to the amount of the value thereof in payment therefor."

Section 87 of the same statute imposes a restriction or limitation upon the power of a corporation to issue stock in payment of property, by declaring that the capital stock shall be and stand for the security of all creditors and "no payment upon any subscription to or agreement for the capital stock of any corporation shall be deemed a payment within the purview of this chapter unless bona fide made in cash, or in some other matter or thing, at a bona fide and fair valuation thereof."

The power of a Maine corporation to issue stock in payment for property, so that the stock will not be liable thereafter at the instance of the creditors of the corporation, is qualified and limited by these statutes.

Glenn v. Liggett, 135 U. S. 523,
Giesen v. Company, 102 Fed. 584.

There is nothing in the decision in the *Old Dominion Copper* case indicating a purpose to over-rule *Glenn v. Liggett*, and the many cases subsequently decided following that decision.

The subscription contract sued on in this case was treated by both the appellant and the Court as requiring the appellant to issue to the appellee full paid and non-assessable common stock for each share of preferred stock paid for by the appellee. In the amended complaint, appellant alleged that it was able, ready and willing to issue and deliver to the appellee full paid, non-assessable shares of common stock. In order to emphasize this offer, the complaint alleges facts tending to show that 500,000 shares of the common stock were issued to Rosene in payment for property, upon a bona fide and fair valuation by the board of directors, and that after the stock had been thus paid for in good faith, as required by the Maine Statute, the stock was returned by Rosene to the treasury of the appellant company, and was available for issuance to the appellee in compliance with the subscription contract.

The fifth affirmative defense in meeting these allegations of the complaint denied that the shares of common stock referred to had been paid for as required by the Maine Statute, and alleged that the board of directors of the appellant, at the time the stock was issued to Rosene, did not make any bona fide and fair valuation of the property, and that the property in fact was not of a value equal to the par value of the stock so issued. Appellant did not raise any question

of law as to the sufficiency of this answer, but replied by general denials, and pleaded certain facts by way of estoppel.

When the case came on for trial before the jury, the evidence as to all of these transactions thus pleaded in both the complaint and fifth affirmative defense was introduced without objection, and the Court instructed the jury fully on the issue therein involved, and no exception was taken by the appellant to these instructions. If, as is now contended by the appellant, it was his theory that the issuance of this stock to Rosene under the facts alleged in the fifth affirmative defense amounted to a payment for the stock, irrespective of the question of the good faith of the directors in the valuation of the property, and that the appellee should legally be required to accept such stock under the terms of the last clause of the subscription agreement, he should have presented these legal propositions in the Court below in some form, and reserved an exception to any adverse ruling of the Court thereon. He is now virtually asking this Court to review the correctness of the instruction of the Court below on the question of the bona fides of the payment of this stock, without having made any objections to the instruction or reserved any exceptions thereto.

It seems manifest that the question as presented in this case is an entirely different question from that

presented in the *Old Dominion Copper* case. The specific question involved in the case at bar was involved in the case of *Trent Import Co. v. Wheelwright*, 84 Atl. 543. In that case, the subscription contract to preferred stock provided that an equal amount of common stock should be issued by the corporation to the subscribers. All of the common stock was issued by the corporation to one of its promoters, ostensibly in payment for certain property conveyed by him to the corporation. He thereupon turned over the requisite amount of the common stock to the treasurer of the corporation to be issued to the preferred subscribers as a bonus. The corporation was organized under the laws of New York. The statutes of that state provided that corporations shall issue stock only for money, or in payment for labor done, or for property actually received for the lawful purposes of the corporation. A subscriber for the preferred stock upon being sued in Maryland upon a subscription contract, pleaded as a defense facts substantially identical with the facts pleaded in the fifth defense in the present case. The trial Court submitted the case to the jury to determine whether the common stock tendered by the corporation in fulfillment of the subscription contract had been paid for to the corporation in property fairly valued by the corporation board at the face value of the stock. The jury returned a verdict in favor of the defendant. The Supreme Court of Maryland held

that the defense was a good defense and upheld the judgment of the trial Court.

XI.

Appellant has submitted an argument upon the question of ratification by appellee and estoppel (Brief, p. 108), which does not seem to be based upon any assignment of error. As we have previously stated, the Court below submitted to the jury the question whether, upon all the evidence, the appellee had ratified the Rosene subscription either expressly or by acquiescence and conduct. No exception was taken to this instruction, and of course no question of law is presented for review.

On pages 37 to 50 of appellant's brief, there is submitted an argument upon the facts in an attempt to show that the Rosene subscription was not disaffirmed or repudiated by the appellee.

We do not deem it necessary to trouble the Court with an elaborate discussion of the evidence. The witnesses, Hartman, Treat and Trenholme, testified positively that the board did specifically and expressly repudiate the subscription by resolution offered and unanimously passed by the board in April, 1906. Any finding of the jury to the contrary would have been set aside because not supported by the evidence. The question of the weight or sufficiency of the evidence

as matter of law was not reserved by any objection or exception in the Court below.

XII.

Finally, we submit that upon the undisputed facts in the record the appellant was not entitled to recover. The capital stock of the appellant was fixed by its Articles of Incorporation at \$6,250,000, being \$2,500,000 preferred stock and \$3,750,000 common stock. The testimony shows that out of the \$2,500,000 of preferred stock, only approximately \$1,600,000 par value was ever subscribed for. (Record, p. 62.)

We think it is settled by the overwhelming weight of authority that no recovery can be had either upon a subscription contract or upon an assessment by the corporation itself for an unpaid subscription unless all of the stock has been subscribed for. It is an implied condition in all subscriptions to the capital stock of corporations that a subscription agreement shall not become binding until the full amount of capital stock has been subscribed.

In the case at bar, the subscription agreement, which is made an exhibit to the complaint, recites that the capital stock of the corporation consists of \$2,500,000 preferred stock and \$3,750,000 common stock. Manifestly, anyone signing this subscription agreement contemplated becoming a member of a corporation hav-

ing a capital stock of \$6,250,000. He might conceivably be willing to take stock in a corporation providing itself with ample capital to carry on its contemplated business, when he would not be willing to become a stockholder in a corporation whose articles provided for a less capital than he deemed to be ample for the success of the business. The rule that it is an implied condition in all subscription agreements that the full amount of the capital stock must be subscribed, is laid down by the following, among other, authorities:

Converse v. Gardner G. Co., 174 Fed. 31,
Masonic Temple etc. v. Channell, 43 Minn. 353,
Eaton v. Pacific National Bank, 144 Mass. 260,
 2 *Clark & Marshall on Corporations*, Sec. 505,
 2 *Thompson on Corporations*, Sec. 1724,
 26 *A. & E. Ency. of Law*, 934,
 10 *Cyc.*, 399.
Rockland etc. Co. v. Sewall, 14 Atl. (Me.) 934,
Penobscot Ry. Co. v. Dummer, 40 Me. 172,
Morgan v. Landstreet, 109 Md. 558.

In this latter case, the court stated the rule as follows:

“Where the capital stock and the number of shares are fixed by the act, or certificate, of incorporation as in the present case, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken.”

We quote from the opinion also the following statement:

“It is sufficient that the Maryland rule is as stated, but, as indicating its soundness and universality, it may

be stated that it prevails in New York, Missouri, Connecticut, New Hampshire, Wisconsin, Iowa, Georgia, California, Illinois, Maine, Tennessee, Ohio, and generally throughout the United States."

In an annotation to this case, reported in 16 *A. & E. Ann. Cases*, 1253, the rule is stated as follows:

"The general principle is settled by the American authorities that where the amount of the original stock of a corporation is specified in the charter, articles of association, or contract of subscription, and there is nothing disclosing a different intention, a subscription to such stock is made upon the condition that the whole amount thereof shall be subscribed by *bona fide* subscribers,"

and among the large number of cases cited from all of the states by the annotator in support of this statement of the rule, he gives the following from Maine:

Oldtown etc. R. Co. v. Veazie, 39 Me. 571,
Lewey's Island R. Co. v. Bolton, 48 Me. 451,
Somerset R. Co. v. Clarke, 61 Me. 379,
Belfast R. Co. v. Cottrell, 66 Me. 185,
Skowhegan etc. R. Co. v. Kinsman, 77 Me. 370,
Rockland etc. Co. v. Sewall, 80 Me. 400.

It is shown by Kellogg, appellant's witness, that the total subscription to the preferred stock aggregated approximately one million six hundred odd thousand dollars, and that the entire preferred stock had never been subscribed for (Record, p. 62). If the rule which we contend for applies to Maine corporations, then it is apparent from appellant's own showing that he is not entitled to recover.

It is due to the Court to state that the Court below had held in his rulings settling the pleadings (which rulings are not brought up in this record) that the rule contended for did not apply to Maine corporations. Of course, we are not appealing from that ruling; but if the case is to be tried as an appeal in equity, and is to be disposed of upon its merits, we submit that the appellant is not entitled to recover, where the record affirmatively shows that the entire capital stock had not been subscribed for, and there has been no waiver of that implied condition.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY,
a Corporation,

Appellee.

REPLY BRIEF OF APPELLANT.

Filed

MAY 13 1910

F. D. Monckton,
Clerk.

WILLIAM H. GORHAM,
Attorney for Appellant.

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

No. 2773.

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY,
a Corporation,

Appellee.

Reply Brief of Appellant.

While the exhaustive Statement of Case by appellant in its opening brief is not complained of or criticized by appellee in its answering brief, appellee attempts there to re-state the case, which re-statement, because of its inaccuracies, appellant cannot let go unchallenged, but will refer to those inaccuracies in the order in which they occur in appellee's brief, as follows:

1. At page 3, lines 5-8, appellee's brief, it states that

"It had been agreed by the owners of the mining property that they would sell the property to the company for \$245,000 cash";

2. At page 3, lines 14 and 17, appellee's brief, it states:

"At any rate it was agreed between all the parties that the new company to be organized would buy the mining properties and water claims for a consideration of \$245,000 (Record, pages 127-28)."

Both of these statements are incorrect and not supported by the record. The sum of \$245,000 was the price agreed upon as between McConnell, representing the owners of the property, and French (Record, p. 129).

But those owners never had any business relations with the appellant company.

3. At page 3, lines 19 to 25, appellee's brief, it states that it appears from Rosene's testimony that

“He had paid French \$20,000 either for an interest in the mining claims or for a share in the profits which French was making by negotiating the sale. (Record, p. 162.)”

The latter part of this statement as to a share in the profits is purely gratuitous on appellee's part, as there is nothing in the record at page 162, or elsewhere, from which the slightest inference can be drawn that Rosene ever had any share in whatever profit French made by negotiating the sale.

4. At page 4, lines 15 to 25, appellee's brief, it states that McConnell refused to accept the obligations of the proposed corporation for \$245,000; and that Rosene took title from the owners and in turn conveyed the same to the company “because of the insistence of McConnell that he must have Rosene's personal obligation for the \$245,000 (page 129).”

Both of these statements are incorrect. There is no evidence that McConnell refused to accept the proposed company's obligations or that he was insistent upon having Rosene's personal obligation for \$245,000. The record shows that McConnell did not

want to take anything but \$245,000 cash (page 129, line 29), and that in addition to the payment of \$20,000 to French on February 7, 1906 (on account of the properties), on March 15, 1906, Rosene paid McConnell \$93,000 (Record, p. 163), and gave him his own personal note for \$100,000 (Record, p. 130).

5. At page 6, line 6-10, appellee's brief, it states:

“None of them (appellant's directors) except Rosene and French had ever been to Alaska and of course had not seen any of the mining property, and never in fact undertook to place any valuation upon the property (Record, p. 132).”

The record shows that French furnished Rosene certain written reports of mining experts on the properties, which report showed \$50,000,000 in gold in the mining ground (Record, p. 152); that Rosene informed himself as to and was satisfied with the competency and reliability of the experts (Record, pp. 138, 152); that Rosene believed their statements as to values (Record, p. 152), and that the board of directors on March 20, 1906, voted that in their judgment \$3,995,000 was a fair and reasonable value of the properties (Min. of Appellant's Board Meeting March 20, 1906, Ex. D1, Record, p. 43).

The statutes of Maine provide that the judgment of the directors as to the value of the property purchased where stock is issued for the same, in the absence of actual fraud, shall be conclusive (Record, p. 28).

It was not necessary for the directors to person-

ally view the properties before forming a judgment as to values; and unless they were mining experts themselves, a personal survey on their part would not have helped them form a judgment as to values. They not only had a right, but it was the practical, common sense thing to do, to rely upon the opinion of experts, as to whose character, competency and reliability they were satisfied. That thing they did.

6. At page 8, lines 11, 13, appellee's brief, it states that the subscription was the only business transacted at the April, 1906, meeting of appellee's board when the alleged repudiation took place. Appellee's witness, Hartman, testifies that he thought there were other matters transpiring at that meeting at that time (Record, p. 84, lines 6, 7).

7. At page 9, lines 5, 8, appellee's brief, it states:

"And in July (appellant) was largely indebted to appellee, either upon account of freights or upon advances made by Rosene on behalf of appellee to appellant. In this condition of accounts" Rosene, without the knowledge of the board, instructed M. M. Perl, its auditor, to credit appellant \$25,000 on the subscription.

Appellee's witness, Trenholme, admits that, on July 15, 1906, appellant had a credit with appellee on the latter's books of \$75,000 (Record, p. 114, line 22, 23).

8. At page 9, lines 15 to 24, appellee's brief, it states that appellant's representatives in Alaska, through permission of Rosene as its managing director, drew on him or appellee, at Seattle, for large

sums of money from time to time as they were needed, and auditor Perl, under private instructions from Rosene, would pay these drafts out of appellee's funds and charge them to appellant's account. Such a statement is so gross in inaccuracy and so wide of fact as disclosed by the record, that it is difficult to understand why appellee makes it. The method of keeping appellant in funds in Alaska and the handling of appellant's drafts drawn at Nome on Seattle, in Seattle, are fully explained by appellee's witness Trenholme, who, in describing the relations between the two companies at Seattle, characterizes the appellee as the "clearing-house" for appellant. (Record, pp. 108, 118.) The statement in appellee's brief that these drafts were paid by auditor Perl under private instructions from Rosene, thereby intimating that the transactions were tainted with irregularity, is not even suggested at any place in the record. The only "private instructions" to Perl from Rosene were in reference to the \$25,000 credit of July 15, 1906 (Defendant's Exhibit No. 1, Record, p. 68), and this item had no relation to any draft whatever. Trenholme testifies that all drafts of appellant originated at Nome, were paid by appellee at Seattle, and that appellee in every case covered itself by drawing drafts for similar amounts on appellant at New York and taking credit for the amounts thereof in its Seattle bank. (Record, pp. 108, 114.)

9. At pages 9, lines 24-28 and 10, lines 1-4, appellee's brief, it states that on August 31, 1906, appellant was indebted to appellee in a sum of something

over \$57,000 (in addition to \$75,000 theretofore paid on the subscription), and that on September 5, 1906, this was the condition of the accounts. Again appellee's witness, Trenholme, contradicts appellee. Trenholme, on cross-examination, reluctantly admits that on September 5, 1906, the "condition of the accounts" was that appellant was indebted to appellee in the sum of \$17,692.00. (Record, pp. 118, 119.)

10. At pages 10, lines 26-28, and 11, lines 1-9, appellee's brief, it states that Rosene early in October, 1906, reported to appellant's board at New York that he had forced appellee's board of directors to agree to subscribe for the \$125,000 of stock to be paid for by the application of moneys "as above set out" (that is, by the application of \$125,000 indebtedness of appellant to appellee on the "new subscription," appellee's brief, p. 10), and appellee was authorizing this new subscription as a full settlement and disposition of the whole matter.

Again, the record fails to show any such evidence.

Rosene, as appellee's witness, at pages 134, 135, 165, 167 and 168 of Record, testifies as to the New York conference between himself and appellant's directors as individuals, but nothing there is found to sustain appellee's statement above as to the application of the moneys.

Appellee admits in brief, page 11, that this meeting of appellant's directors in New York in October, 1906, was not a "formal directors' meeting," but would have it implied as a directors' meeting, because the conference "took place in the directors' room of appellant" in the office of A. A. Hausman

& Co., and because all the directors but one were present and assented, notwithstanding the testimony of Rosene, as appellant's witness, that the meeting was not a board meeting (Record, p. 165), and notwithstanding his further qualification that "Pierce (one of appellant's directors) understood it if he was not present, he understood it within a very short time." (Record, p. 176.)

At page 26, lines 27, 28, of its brief, appellee has invoked the rule in its own behalf that "the board could act only when in session as a board." We invoke the same rule.

11. On page 12, lines 25-28, appellee's brief, it states that E. J. Mathews, president of appellant in the year 1908, testified "that when he became president he was informed or knew that the appellee *had*, or claimed that it had repudiated the Rosene subscription (page 76)."

The record at page 76 is: "Never considered that defendant had repudiated it before he had any connection with plaintiff; knew that defendant claimed they had repudiated it."

Appellee contends that the verdict of the jury "settles the questions of fact in favor of appellee. No exception was made by the appellant to these instructions. It claimed that it requested Special Instruction No. 16, which was in part inconsistent with the general charge. The requested instruction is not brought up by the record and, therefore, its correctness cannot be considered." (Brief, p. 13.) The requested instruction is found in the record

under the certificate of the clerk of the trial court at page 194.

Furthermore, the verdict of the jury does not settle any questions of fact in this case, unless according to law and justice; as this court, under the Act of March 3, 1915, Chapter 90, 38 Statutes at Large, 956, has power to render judgment upon the record as law and justice shall require.

ARGUMENTS.

Appellant in its Specifications of Error (brief 29-35) departed from the order of its Assignment of Errors as filed at the time of taking this appeal (Record, p. 197), and by omitting in the Specification the first, fourth, and fifth assignment of errors, waived those assignments.

In replying to appellee's argument, we will discuss these points in the order in which they are there arranged:

I.

The first assignment of error (Record, p. 197) is not included in the Specifications of Error asserted and intended to be urged, and is therefore waived.

II.

Delivery of Stock.

Appellee cites Delaware County vs. Safe Co., 133 U. S. 473, in support of the rejection of the stipulation offered in evidence by appellant. (Record, p. 69.)

The pleading in that case was not a former complaint in the action, as appellee states in his brief, p. 16, but was the complaint in an action brought by

the plaintiff therein against its assignors. And of the cases cited in *Delaware County vs. Safe Co.*, *supra*, in the case of *Combs vs. Hodge*, 21 Howard, 397, the parties to the suit, a pleading of which was relied upon as evidence, were different from the parties to the suit in which it was sought to be introduced as evidence; and in the case of *Pope vs. Allis*, 115 U. S. 363, there was introduced in evidence a deposition, to which, as an exhibit, was attached a copy of the complaint between the plaintiff in *Pope vs. Allis* and a stranger, relating to the same subject matter which the court held was competent evidence. It appears the complaint thus introduced was sworn to, but there is no consideration by the court of the admissibility of a statement not under oath.

In *Murray vs. Chase*, 134 Mass. 92, cited by appellee, the evidence offered and rejected was an affidavit for a continuance by an attorney; and in the case of *Dennie vs. Williams*, 135 Mass. 28, the evidence was an answer in a formal suit against only one of the defendants in the suit where the pleading was offered as evidence.

It is true as appellee states, brief, p. 17, that with the offer of the stipulation in question there was no offer of any evidence to show that the client had any knowledge that the stipulation was ever entered into by its attorneys, but, in our opinion, the burden is on the appellee to show that the admission and the stipulation were, in fact, erroneous by inadvertence or otherwise. The stipulation was within the professional function of the attorney, and binds the client in the case where it is filed. It was a matter

of waiving proof of an allegation of the amended complaint, the truth of which was easy of ascertainment by the attorney so stipulating.

Chamberlain's Modern Law of Evidence, sec. 1262.

But it is not material whether there was any evidence that the matters contained in the stipulation were ever actually embodied in any formal pleading (brief, p. 17), because under the terms of the fourth paragraph of the stipulation "the second amended answer as *thus* amended *shall be considered and stand* as defendant's answer to said amended complaint as so amended." It is clear that it was never the intention of the parties even that the answer so amended should be amended by interlineations.

We submit the stipulation was competent and should be considered by this Court in review on appeal as part of the record evidence.

Arguing against its materiality, appellee states as premises:

(1) That the \$125,000 stock authorized by the resolution of September 5, 1906, was paid for by applying the \$75,000 credited appellant prior to that date and by an additional credit made on September 5, 1906 (brief, p. 18). No such credit was shown—the additional credit or credits on account of appellant's stock were, September 6, 1906, \$25,000, and September 15, 1906, \$25,000; (2) that the stock of plaintiff received by defendant represented stock which had been paid for by the \$125,000 Rosene had paid out of defendant's funds. There was only

\$75,000 paid by Rosene out of defendant's funds; the balance was authorized by appellee's board.

Appellee argues that the testimony shows conclusively that the admission of defendant's attorney in the stipulation was inadvertent and not true in fact (brief, p. 19). No offer was made by appellee at the trial to show any inadvertence, and the record fails to show conclusively, or otherwise, that the admissions of the stipulation were not true in fact.

Appellee argues that Hartman in admitting in his letter (Defendant's Ex. 3) that the subscription of stock authorized had been fully paid "as evidenced by the certificate of capital stock now held by the Northwestern Commercial Co.," was apparently in error. The letter speaks for itself. The appellee produced it. Hartman, as appellee's witness, identified it, and was interrogated as to it (Record, p. 82), and did not attempt to claim any incorrect recitals therein.

The evidence, including the stipulation, overcomes the presumption of the assignment of stock to appellee on the day of its dating, September 24, 1907; and the evidence, including the Rosene letter of April 18, 1906, with its marginal notes ("Exhibit N"), addressed to appellant's secretary, asking for the stock under payments made by appellee on the subscription, tend to show at least that the stock was demanded as payments were made on the subscription.

And if demand was made for stock upon payment, is it not fair to presume that the demand was complied with, in accordance with the terms of the sub-

scription agreement that upon payment full paid shares should be delivered therefor?

The marginal notes on Rosene's letter of April 18, 1916 (Ex. "N"), are all that survive Henderson—he is dead and could not be called to show when he complied with the demand of that letter.

If the stipulation taken in connection with Rosene's letter to Henderson of April 18, 1906 (Ex. "N"), has any probative force tending to show a delivery to and acceptance of appellant's stock by appellee, from time to time, as payments were made on the subscription, then the rejection of that stipulation was prejudicial to appellant for the reason that if appellee accepted stock under the subscription as payments were made under it in April and July, 1906, that fact would have a direct bearing on appellee's alleged repudiation of April, 1906, if there were such a repudiation.

III.

The record shows that the minutes of appellee's Executive Committee's meeting of October 23, 1907, were identified by appellee's secretary and read in evidence and afterwards stricken by order of Court. Those minutes are part of the *supplemental record*, consisting of the exhibits, and are easy of identification.

The only bearing this evidence could have would be to show the continued relations between appellee and Rosene, in connection with appellee's contention that Rosene had misappropriated so large a sum of appellee's money as \$75,000.

If, because the minutes of this meeting were not

marked and thus identified, after being read in evidence, they are not now available, though present, then appellant must confess the second specification of error (third assignment of error).

IV.

The fourth assignment of error is not included in the specifications of error intended to be urged, and is therefore waived.

V.

The fifth assignment of error is not included in the specifications of error intended to be urged and is therefore waived.

VI.

The Third Specification of Error.

Trenholme, witness for appellee, was asked: Did the board of trustees at any time ratify any subscription, etc.?

This obviously called for the conclusion of the witness; appellee admits as much when it states:

“There might be a course of conduct on the part of the appellee in its business dealings and transactions with the appellant which would be held to be an acquiescence or ratification of the subscription and be binding as such upon the appellee” (brief, 26, lines 4, 9).

It does not follow, as appellee argues (brief, 27), that any action by the board would be a positive action, either ratifying or repudiating the subscription. A course of conduct of appellee which would be held in law an acquiescence or ratification, might have been on the part of appellee's board of trustees

as of any of its other officers or agents; it could only act vicariously.

VII.

Notice of Repudiation to Appellant.

Appellee argues that the objection of appellant to the question put to Trenholme, whether he informed the president of appellant of the action of appellee's Board of Trustees' meeting of April, 1906, in repudiation, on the ground of incompetency, was not well taken, and that the objection should have been on the ground of its materiality.

Appellee was attempting to prove notice of the repudiation,—whether or not legal notice was given was a very material point in the case. The materiality of legal notice could not be questioned, but whether a certain statement of facts was sufficient to show notice depended upon whether competent evidence was offered, that is, relevant, fit and appropriate; not that the witness Trenholme was incompetent to state facts, but that the facts stated or sought to be adduced were not competent to prove the notice required by law.

Appellee further argues that because a large part of appellant's business, consisting of the purchase and shipment of goods to Alaska, was transacted at Seattle, and because appellant's president was present in Seattle for some little time in the spring of 1906, therefore he was presumably in Seattle on the business of his company; that there was nothing in the record indicating that he was in Seattle on other business. But it overlooks the fact that by resolution of appellant's Board of Directors of March 21,

1906, Rosene was appointed managing director with full power and authority to take charge of the operation of appellant company (Minutes of appellant's Board, March 21, 1906, Exhibit D-2, Record, p. 43). This would preclude any presumption that the president of that company was here on the company's business. It had a managing director on the ground, with full power and authority in the matter of its operations, and that was at least *prima facie* evidence that the president had no business here connected with the company, at least with its operations. If there was any other business of appellant here at that time in which the president could have been engaged, it does not appear in the record, nor was it necessary to show that the president was not here on other business. He had a right to be here as a traveler in transit. We submit that he was entirely disassociated with the company's business while at Seattle, 3,500 miles from New York, where the appellant had its principal office outside the State of Maine, and where its board held its meetings, and, therefore, notice to the president at Seattle as testified to by Trenholme was not notice to the appellant.

VIII.

Instruction No. 16.

This instruction is properly of record as an "excerpt from plaintiff's request for instructions" filed with the Clerk of the court below, December 1, 1915, and is found on pages 194, 195 of the Record.

Though called for in appellant's praecipe for record on appeal served on appellee and included in

the record, appellee has evidently overlooked it.

IX.

Assignments of Errors 9 to 17, inclusive, being Specifications of Error 6 to 14, inclusive, are urged, under Act of Congress of March 3, 1915, Ch. 90, 38 St. L. 956, which provides that in cases where an equitable defense has been interposed, on review the appellate court shall have power to render such judgment upon the record as law and justice shall require.

The case of *Dunsmuir v. Scott*, 217 Fed. 200, cited by appellee, has no application here as that was an action at law.

We seek a review and judgment on the law and facts as disclosed by the record.

X.

We are content to rest the validity of the issuance of appellant's common stock on the record and the cases cited by appellant in its opening brief (under Point "Bonus Stock," p. 94).

The amended complaint alleges the issuance of the stock strictly within the provisions of the statutes of Maine, to wit, that the mining properties purchased and paid for by the issue of that stock were, in the judgment of appellant's directors, necessary for its business and the purchase price, \$3,995,000, in the honest and *bona fide* judgment of appellant's directors, the fair and reasonable value thereof (Par. IV of Am. Complaint, Record, pp. 17, 18).

Appellant, as appellee would have it appear (br. 36), is not now contending that the issuance of the stock to Rosene was under the facts as alleged in the fifth affirmative defense, and amounted to a payment

for the stock irrespective of the question of good faith of the directors in the valuation of the property.

A recital of the proofs in the record in support of the allegations of the amended complaint are found in appellant's opening brief, at pages 1 to 14, inclusive. The judgment of appellant's directors as set out in the record was not impeached for fraud, actual or constructive, by appellee on the trial. An attempt was made by appellee to show by its witness Rosene that he objected to the arrangement for the issuance of the common stock (Record, page 131), but on cross-examination he admitted that he acquiesced in the method of procedure concerning the issuance of this stock to him for the mining properties, that is, the three and three-quarter million of common stock, that it was agreeable to him, and it was certainly agreeable to the rest. (Record, p. 148, lines 18, 24.)

Any objections by Rosene at that time were merged in the Agreement and Supplemental Agreement of Rosene entered into pursuant to authority of appellant's board of March 20, 1906.

There was no attempt on appellee's part to show that in the issuance of the common shares there was fraud, either actual or constructive, except so far as that issue might be a constructive fraud on subsequent subscribers.

But when all the directors and stockholders, at the time of such issuance, all concur, there can be no constructive fraud to future subscribers, then or relating back, *nunc pro tunc*, upon such future subscription

taking place. (See Old Dominion Copper M. & S. Co. Case, 210 U. S. 28.)

XI.

The questions of ratification and estoppel in appellant's opening brief (p. 108), are urged under the new procedure under Act of Congress of March 3, 1915, above referred to.

In seeking by this appeal, a review and judgment on the law and facts as disclosed by the record, it is proper to urge all questions arising on that record, questions both of law and fact. That we have attempted to do.

XII.

Appellee raises the question that in all subscriptions to capital stock it is an implied condition that it shall not be binding until all of the capital stock has been subscribed; that the full amount of appellant's capital stock has never been subscribed, and therefore the subscription in suit is not binding on appellee (br. p. 30); and states that the court below in its ruling settling the pleadings held that the rule contended for did not apply to Maine corporations (br. 42).

Appellant's contention is that the rule as contended for by appellee does not apply to a subscription containing an unconditional promise to pay and that the subscription in suit contains an unconditional promise to pay.

We reply to appellee's contention and statement by adopting as our own and submitting the language of the court below in the ruling on this question referred to on page 42 of appellee's brief:

“It is contended by the defendant that its subscription was upon the implied condition that the entire amount of the capital should be subscribed, and hence that the defense set up should prevail against demurrer. This contention necessitates a construction of the subscription contract with special reference to the laws of Maine, the state in which the plaintiff corporation was created.

Glenn v. Liggett, 135 U. S. 533.

The doctrine of the Maine cases seems to be that a bare subscription to the stock of a corporation is subject to the implied condition that the entire capital stock of the corporation shall be subscribed before the liability of the subscriber to pay therefor arises; but that where an unconditional promise to pay is made, it is not necessary that the entire capital stock should be subscribed before the subscriber can be held.

Penobscot R. R. Co. v. Dummer, 40 Me. 172,
63 Am. Dec. 654;

Penobscot R. R. Co. v. White, 41 Me. 512, 66
Am. Dec. 257;

Old Town & Lincoln R. R. Co. v. Veazie, 39
Me. 571;

Somerset & Kennebec R. R. Co. v. Cushing, 45
Me. 524;

Rockland Mt. etc. Co. v. Sewall, 3 Atl. 181
(Me.);

Id., 14 Atl. 939;

Kennebec etc. R. R. Co. v. Jarvis, 34 Me. 360;
Skowhegan & A. R. R. Co. v. Kinsman, 77 Me.
370.

These holdings are based upon the principle that when a subscription is made without an express promise to pay, the promise to pay is implied by law, and is subject to all the conditions which the law considers must have been contemplated by the parties in making the subscription. Likewise when the promise is to pay legal assessments, it is considered that the parties contemplated the performance of all of the usual conditions to the levying of assessments before liability should attach.

Somerset & Kennebec R. R. Co. v. Cushing,
supra;

Oldtown & Lincoln R. R. Co. v. Veazie, *supra*.

The condition that the entire capital stock should be subscribed before the subscriber should be held liable is but an implied provision of the contract of subscription, which the law considers must have been the intention of the parties, in the absence of expressions to the contrary. There is nothing to prevent a subscriber from agreeing to pay his subscription, even though the entire capital stock of the corporation be not subscribed.

Skowhegan & Athens R. R. Co. v. Kinsman,
supra.

Where it appears from a reading of the subscription agreement that such was the intention of the parties the Court should enforce the contract which the parties have made, and not undertake to make another for them.

The contract here in question leaves no room for inserting therein an implied provision that the capital stock of the corporation should be first subscribed before liability should arise. The subscriber promised to pay 20% of his subscription on signing. This certainly negatives an intention as to that portion of his subscription, at least, that his promise was conditioned upon the entire capital stock being subscribed. He then promises to pay 10% of the subscription on July 15, 1906. There is no room for any construction as to this amount; the liability arose when the day came. The party then promised to pay the residue as called for by the directors upon 30 days' notice, the only condition being that not over 50% of the subscription should be payable during the year 1906. If this last promise stood alone, there might be some ground for contending that the parties intended that no calls should be made by the directors until all of the stock had been subscribed; but the contract must be considered as a whole in ascertaining the meaning of a part thereof. Having made an unconditional promise to pay 30% of his subscription, a part of which was paid in cash, the subscriber can hardly contend that his promise to pay the residue upon calls was based upon the implied condition that the entire capital stock should first be subscribed. Such a condition would go to the question of whether or not he wished to embark on the enterprise,—whether he wished to be liable at

all,—and if he waived such condition as to a part of his subscription, he cannot claim that he intended to preserve it as to another part, without an express stipulation to that effect. The court will not, under the guise of effectuating the intention of the parties, read into this contract a provision which the parties have by their own words shown was not intended.

All of the Maine cases cited are in harmony with the conclusions here reached. In *Penobscot R. R. Co. v. Dummer, supra*, there is no mention of any express promise to pay, and it does not appear but that the action was upon the promise implied by law from the fact of subscription. The same may be said of *Penobscot R. R. Co. v. White, supra*. In *Old Town & Lincoln R. R. Co. v. Veazie, supra*, the promise was to pay ‘legal assessments.’ In *Somerset & Kennebec R. R. Co. v. Cushing, supra*, the by-laws provided for a capital stock of 7,000 shares, and the promise was to ‘pay to the treasurer of said company all assessments that shall be made on said shares, in pursuance of the by-laws and charter of said company.’ In *Rockland Mt. etc. Co. v. Sewall, supra*, it was agreed that the capital stock of the corporation should be \$40,000, divided into shares of \$100 each, and the promise was that the “parties to the agreement shall contribute toward the capital stock such sums as they may severally place against their names.’ In the absence of an expression of

the parties, the law implied that this promise was upon the usual condition that all of the \$40,000 should be subscribed before liability attached. The later report of the case in 14 Atl. 939, necessarily involved the same contract.

The fact that this is an action upon an assessment cannot vary the principles above stated. The liability to pay the subscription having attached, the assessment and notice thereof was but a formal demand for payment."

In the case of Showhegan & Atkins R. R. Co. v. Knisman, 77 Me. 370, the subscription read:

"We, the undersigned, hereby agree to take and hereby subscribe for the number of shares of stock in said railroad company hereunto by each of us placed opposite our names in the following list, said shares to be fifty dollars each. And we agree to pay the par value of the same. And all who shall subscribe for as many shares in the following subscription as they have subscribed for in the former lists, are hereby released from all former subscriptions to said Company."

Suit was brought on that subscription and the defense was that the minimum number of shares named in the charter were not subscribed for. The Court said:

"A person by simply subscribing for shares in a corporation without words of promise to pay assumes obligations imposed by law on such subscriber. He is understood to have agreed to

assume a certain percentage of the responsibility of the enterprise on condition that the amount of the responsibility be made certain and the remaining percentage be assumed by responsible parties. He can require that the full amount of the capital stock agreed upon or established by the charter as necessary for success shall be engaged before he pays in his part. He is only obliged to pay legal assessments and where the capital stock has not been fixed or when fixed has not been subscribed for, there can be no legal assessment unless the charter otherwise provide. *Som. & K. Co. v. Cuching*, 45 Me. 524; *Somerset R. Co. v. Clarke*, 61 Me. 379.

But a person may in his subscription voluntarily assume any other obligation not forbidden by law. He may waive any and all of the conditions implied by law in a naked subscription. He may impose other conditions, or he may promise payment for his shares without any condition. His promise, once made, will be binding, there being in such cases sufficient consideration in the obligation of the company to deliver the shares. *K. & P. R. R. Co. v. Jarvis*, 34 Me. 360; *Bucksport & B. R. R. Co. v. Buck*, 65 Me. 537; *City Hotel v. Dickinson*, 6 Gray, 586; *Lexington & W. Cam. R. R. Co. v. Chandler*, 13 Met. 311; *Pen. & K. R. R. Co. v. Bartlett*, 12 Gray, 244; *Boston B. & G. R. R. Co. v. Wellington*, 113 Mass. 79.

In such cases the express promise is to be enforced by an action thereon, and not by an action on a promise implied by law only. * * *

The defendant claims he is not liable to pay for the shares he thus subscribed for, because the amount of the capital stock was not fixed and the minimum number of shares in the charter were not subscribed for. He might not be liable to pay in such case, if he were a mere subscriber for stock or if this action were for legal assessments; but he in addition to his subscription for shares expressly promised to pay \$50 each for them and this action is on his express promise to pay and not on any promise merely implied by law.

His promise was unconditional and he cannot invoke new conditions. In *Ken. & P. R. R. Co. v. Jarvis*, 34 Me. 360, above cited the capital stock was fixed by the directors at 12,000 shares with right of increase to 20,000 shares. The shares subscribed for were never so many as 12,000, and the defendant invoked that omission in defense. The court expressly overruled that defense and held his liability on the ground he had expressly promised to pay (not legal assessments, but) 'at such times, to such persons and in such installments as shall be hereafter required by a vote of said company.' The case is decisive of this. In the cases cited by the defendant it will be found there was no express promise to pay, or only a promise to pay legal assessments or that the action was only on an

implied promise as for legal assessments. In such cases the conditions implied by law must be shown to have been fulfilled. In this case those conditions were waived by the express promise to pay absolutely.”

We submit that appellee is liable on the subscription in suit, notwithstanding the fact that the full amount of appellant's capital stock has never been subscribed for.

Respectfully submitted,

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Attorney for Appellant.

**In the United States
Circuit Court of Appeals**

For the Ninth Circuit

MAINE NORTHWESTERN DEVELOPMENT
COMPANY, a Corporation,
Appellant,

VS.

NORTHWESTERN COMMERCIAL COMPANY,
a Corporation,
Appellee.

APPELLEE'S REPLY BRIEF ON MOTION TO
DISMISS.

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APPELLEE'S REPLY BRIEF ON MOTION TO
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I.

(a) Among the cases cited by appellant is that of *American Sign Co. v. Electro etc. Sign Co.*, 211 Fed. 196, wherein Judge Van Fleet held that the rule applied in *Hartshorn v. Day*, 19 How. 211, and *George v. Tate*, 102 U. S. 564, was applicable only to actions at law upon sealed instruments.

We have assumed that the decision in *Hill v. N. P. Ry. Co.*, 113 Fed. 914, and *Standard Portland Cement Corporation v. Evans*, 205 Fed. 1, committed this Court to the doctrine that the same rule applied in actions at law upon unsealed instruments.

Assuming, therefore, that the defense of fraud in inducing the execution of an instrument is an equitable defense under the rulings of this Court in the cases cited, the rule has no application to the facts pleaded in this case.

In the *Portland Cement* case, this Court used the following language in defining what defenses based upon fraud are legal and what are equitable within this rule:

“The facts alleged do not show that the notes were not executed by the corporation, or that the execution thereof was procured by any trick or fraud so as to render them void, and thus present a defense that might be made under a plea of *non est factum*. They show that the notes were executed understandingly and intentionally, but that the assent of the plaintiff-in-error to the execution of the same was procured by fraud and deceit, and that the action of one of the officers of plaintiff-in-error was influenced by fraudulent motives.”

In the case at bar, the facts pleaded *do* show that the instrument sued on was not executed by appellee nor assented to by it, and that the appellee, immediately upon ascertaining that such an instrument had been executed in its name by Rosene, repudiated it and gave

notice thereof to the appellant. The defense further shows, as a part of the related facts and in explanation of the signature, that the appellee's name was signed to the instrument by Rosene without its authority, and that Rosene was procured to sign the name of the appellee to the instrument by the promise and agreement of appellant to buy his mining property and pay over to him any collections appellant might make from appellee on this instrument. This defense comes squarely within the first statement of the rule as given by this court in the above quotation. All of the facts pleaded could have been proven under a plea of *non est factum* at common law. Under the system of pleading prevailing in the State of Washington, however, there is no such plea as *non est factum*, and the pleader is required to state the facts constituting the defense.

In its last analysis, the defense referred to is in substance that the instrument was never executed by the appellee, nor by its authority, nor assented to by it, but was promptly repudiated by it; that its name was signed thereto by Rosene, its president, without its authority, and that Rosene was adversely interested at the time and signed the appellee's name to the contract pursuant to the agreements and understandings between Rosene and the appellant set out in the plea. The plea would have been good and sufficient without any recital of the facts which induced

Rosene to sign the name of the appellee to the instrument.

The fact that the defense, after alleging that Rosene had no authority to execute the instrument on behalf of the appellee, also alleges that Rosene was disqualified by reason of his adverse interest from acting as the agent of the appellee in this matter does not convert the defense from a legal to an equitable one. Whether the plea is double or not is immaterial on this issue.

All of the facts pleaded go to show that at the time this action was instituted there was no legal contract in existence. The contract was never authorized by the appellee, and was never executed by anyone authorized to act for the appellee, and was repudiated by the appellee; its name was signed thereto by one who was both unauthorized and disqualified to act on its behalf. It is not a case of the execution of a contract understandingly and intentionally by the appellee under the influence of fraudulent misrepresentations; but, on the contrary, is a case where no contract ever came into existence, because the instrument was never executed by anyone authorized to contract for the appellee.

(b) The appellee further contends that the fifth affirmative defense is also equitable (page 19, Brief). The contract sued on was an alleged subscription to

the preferred shares of appellant's stock. The subscription agreement provided that each subscriber to preferred stock should, upon payment, receive as a bonus an equal amount of common stock (Record, p. 22). That was a material part of the contract of subscription, and it was necessary for plaintiff to show a readiness and ability to perform this part of the contract, as a pre-requisite to recovery against the defendant. The amended complaint alleges that the capital stock of the company consisted of \$2,500,000 of preferred stock of the par value of \$5 per share, and \$3,750,000 of common stock of the par value of \$5 per share; that the corporation purchased from Rosene 171 mining claims and water rights in Alaska, and agreed to pay therefor \$3,995,000, consisting of \$245,000 in cash, and \$3,750,000, par value of fully paid non-assessable shares of the common stock, being the full amount of the common stock; that the mining claims and water rights were, in the judgment of the appellant's directors, necessary for its business, and that said sum of \$3,995,000 was "in the honest and bona fide judgment of plaintiff's directors the fair and reasonable value of said mining claims and water rights."

It further alleges that after this common stock had been, in good faith, issued to Rosene in payment for the mining property, he deposited 499,989 shares thereof with A. A. Hauseman & Co., to be issued as

a bonus to subscribers to the preferred stock under the terms of the subscription agreement. These allegations were intended to show that plaintiff was possessed of the necessary number of common shares to enable it to perform its part of the agreement with all subscribers to preferred stock, and that such common shares had been already paid for in property and were therefore free from liability to assessments under the Maine laws.

The fifth affirmative defense is in effect merely a traverse of the allegations of the amended complaint in this respect. The defense sets out the Maine statute, Section 87 of which provides that:

“The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription to or agreement for the capital stock of any corporation shall be deemed a payment within the purview of this chapter, unless bona fide made in cash, or in some other matter or thing at a bona fide and fair valuation thereof.”

The defense then shows that this common stock had not been paid in cash, nor in any other thing at a bona fide valuation. To that end the defense alleges that prior to the organization of the appellant company, the owners of the mining property, that is, Rosene and his associates, agreed to sell the mining property to the corporation to be organized for \$245,000. That Rosene and certain other associates, chiefly

A. A. Hauseman, promoted the appellant corporation and as a means to enable them to get bonus stock in the corporation contrary to the Maine statute, devised the scheme of having the mine owners place the entire title in Rosene, who would then convey the property to the appellant corporation for the ostensible consideration of \$3,995,000, consisting of \$245,000 cash and \$3,750,000 common stock, it being distinctly understood and agreed that the real consideration for the property was \$245,000 in cash, and that the common stock so pretended to be issued as a part of the purchase price of the mining property was not to be issued or delivered to the owners of the mining property, but that \$1,250,000 thereof was to be divided between Rosene, Hauseman and French, the promoters of appellant, and the other \$2,500,000 was to be issued as a bonus to subscribers to preferred stock. The plea further alleges that the mining property was not worth to exceed the \$245,000 cash which was paid therefor; that the directors of the appellant corporation never in good faith valued it at any sum in excess of that amount; and that the shares of common stock issued ostensibly as part of the purchase price of the mining stock were never intended by the directors of the corporation, or any parties connected with the transaction, as a payment on the mining property.

The whole purpose and object of this fifth defense was to show that the payment for this common stock

was not made either in cash or property "at a bona fide and fair valuation thereof," so as to free its holder from liability to creditors, and that therefore appellant was not in a position where it could issue to this appellee shares of fully paid non-assessable common stock in accordance with the terms of the subscription agreement; and it being unable to perform the contract on its own part, it was not entitled to enforce performance against this appellee.

The defense is identically the same as that made in the case of *Trent Import Co. v. Wheelwright*, 84 Atl. 545, where the Court held that this defense was legal, and not equitable.

With respect to both of these defenses, a fair test as to whether they are legal or equitable would be—Would a bill in equity lie in aid of the defense at law? If a bill in equity had been filed by the defendant, alleging—as is done in the first defense—that the subscription contract was never executed by defendant, nor assented to by it, but was signed by its president without authority from defendant and in furtherance of his own personal interests adverse to defendant; that plaintiff had full knowledge of these facts when it accepted the contract; and that defendant gave plaintiff timely notice that it repudiated the contract: The court would have dismissed the bill for the very obvious reason that, as defendant had never executed

the contract, it needed no equitable relief. As to the fifth defense, if the plaintiff is unable to deliver to defendant full-paid common stock, in compliance with the contract sued on, no aid of a court of equity is required to enable the defendant to avail itself of that defense.

We respectfully submit that neither the first nor fifth defenses are equitable defenses, and therefore that this Court has no jurisdiction to review the case by appeal.

Respectfully submitted,

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